In the Supreme Court of the State of Montana

Supreme Court No. DA 20-0065

Animals of Montana, Inc., Troy Hyde,
Permit Holder,

Petitioner and Appellant,

-vs-

State of Montana Department of
Fish, Wildlife, and Parks,

Respondent and Appellee.

Appellant's Opening Brief

On Appeal from the Montana First Judicial District Court
Lewis & Clark County, the Hon. Michael F. McMahon, Presiding

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Statement of the Case

After twenty-seven years (Appendix B at 110), the Department of Fish, Wildlife, and Parks (FWP) revoked the permit of Animals of Montana, Inc. (AMI) and its permit holder, Troy Hyde. (Appendix C). The revocation was affirmed by a district court after judicial review. (Appendix A). Hyde and AMI now appeal to this Court.

Statement of the Issue

Both the district court's decision and the FWP decision were the result of violations of the due process clause. Specifically, they are violations of AMI's and Hyde's rights to be free from entrapment by estoppel.

Statement of Facts

For almost three decades FWP has tried to fit AMI into a statutory and regulatory structure that does not accommodate AMI's mission or purpose. It is not wholly the fault of FWP; the Legislature shares much of the blame. However, FWP's failure to adequately classify or accommodate AMI's purpose within the existing statutory schemes placed AMI on an inevitable path to arbitrary enforcement for twenty-seven years.

The confusion about AMI's status is exemplified in a footnote of the District

Court's Order on Petition for Judicial Review. (Appendix A n. 1). FWP has classified and permitted AMI to function as a "roadside menagerie," as defined in *Mont. Code Ann. § 87-4-801(1)*. A "roadside menagerie" is defined in relevant part as "any place where one or more wild animals . . . are kept in captivity for the evident purpose of exhibition or attracting trade, on or off the facility premises. It does not include the exhibition of any animal by an education institution or by a traveling theatrical exhibition or circus based outside of Montana." However, AMI does not exhibit its wild animals for exhibition to the public and the facility is not open to the public. (Appendix A at 2) (noting there is no disagreement between the parties that AMI's facility is not open to the public).

A second type of menagerie contemplated by the Legislature is a "wild animal menagerie." *Mont. Code Ann. § 87-4-801(3)*. A "wild animal menagerie" exists for purposes "other than public exhibition." *Id.* However, a wild animal menagerie is limited to ten animals, *Mont. Code Ann. § 87-4-804(6)*. AMI has more than ten animals and, therefore, does not qualify as a wild animal menagerie although its mission and scope is more akin to the statutory scheme contemplated in a wild animal menagerie.

The district court called AMI a "wildlife casting agency," based on the fact

that AMI was not "run for public viewing." (Appendix B at 2). The court apparently reached this conclusion based on conditions contained within AMI's 2015 roadside menagerie permit. (Id.) While an appropriate title for AMI's mission, Montana law does not recognize a "wildlife casting agency."

Consequently, for almost thirty-years, both AMI and FWP have tried to shoehorn AMI's activities into a regulatory scheme that does not fit its sole purpose. Testimony at the revocation hearing affirmed that AMI is a "unique business," and a 2012 environmental assessment of AMI noted that "'no statute or regulation currently addresses this type of private activity that the applicant is proposing.'" (Appendix B at 93). This did not stop FWP from issuing a permit to AMI.

First, FWP issued AMI a "game farm license." (Appendix Bat 103). However, the game farm license was replaced by a "zoo menagerie license." (Id.) Apparently, that license was ultimately replaced with the roadside menagerie licence despite the fact that AMI did not open its facilities to the public.

Albeit flawed, the process worked until 2015 when, without allowing the decades-old business the opportunity to correct potential problems, FWP found 25 distinct violations of the roadside menagerie regulations. According to FWP, the

violations resulted in a mandatory revocation of AMI's permit. FWP served AMI a Notice of Revocation, Imposition of Penalties and Opportunity for a Hearing on December 28, 2015.

On June 12, 2017, a contested hearing was held. (Appendix B). Through counsel, AMI presented context -- if not an outright defense -- for each violation. AMI also put forth evidence that previous FWP inspections[1] had identified possible violations, but that AMI had been notified of the violations and been allowed to correct them. (Appendix B at 110). At the conclusion of the hearing, the hearing examiner *sua sponte* sought additional briefing from the parties on "why [he] shouldn't be looking at collateral estoppel . . . ."

The estoppel argument arose from a misdemeanor prosecution in the justice court of Madison County. (Appendix B at 13-14). Hyde was convicted of a misdemeanor arising from an incident -- which also formed the basis for a violation in the regulatory proceedings -- in which one of AMI's wolves was taken to the Pioneer Bar in Virginia City for a photography session with a professional

[1] *Mont. Code Ann. § 87-4-806* mandates that all roadside menageries be open to inspection at all reasonable hours.

photographer, David Yarrow[2].

A second criminal citation for an incident that occurred in Michigan was dismissed for lack of jurisdiction. (Appendix B at 157-58). The Michigan incident did result in regulatory violations, however.

In total, FWP alleged 25 violations committed by AMI and Hyde. After the contested hearing, the Hearings Officer determined FWP had proven twenty-two of the twenty-five violations. (Appendix D at 27).

The Hearings Examiner also concluded AMI was not entitled to avail itself

[2]Available at: https://i.pinimg.com/originals/4c/e9/b2/4ce9b2d055b0d0e446c2ea501fd1551e.jpg (last accessed 9/4/2020)

of an estoppel argument. (Appendix D at 8-11).

Finally, the Hearings Examiner concluded that neither AMI nor Hyde had established the existence of an historical *de facto* or official "opportunity to correct" policy on the part of FWP. (Appendix D at 7).

The Hearings Examiner issued a proposed order that AMI's Roadside Menagerie Permit be revoked, without right of renewal, effective August 31, 2017. (Appendix D at 27).

Hyde and AMI appealed the Hearing Examiner's Findings of Fact and Conclusions of Law to the Director of FWP, Martha Williams. On January 23, 2018, Director Williams held a hearing. At the hearing, the parties argued exceptions to the findings and conclusions from the Hearing Examiner. (Appendix C at 1). Director Williams' Final Order, noted that AMI left undisputed 17 of the 22 factually established violations, and the [Hearings Examiner's] Proposed Order ruled based upon the lack of dispute by AMI." (Appendix C at 2, 3-4) (citing Appendix D, violations 1, 3, 6-20, pp. 13-23).

Director Williams summarized the applicable law including the Montana Administrative Procedures Act (MAPA). *Mont. Code Ann., Title 2, Ch. 4*. Director Williams "upheld" the "Hearing Officer's Recommended Order."

(Appendix C at 5).

Hyde and AMI then filed a petition for judicial review. Although the lion's share of the disputed activity occurred in Gallatin County where AMI is located, venue was changed to the First Judicial District Court before District Court Judge Michael F. McMahon. (Appendix A). The parties briefed but did not argue the petition, and the district court stayed execution of Director Williams' final order. On January 17, 2020, the district court (1) affirmed the decision to revoke AMI's permit and dissolved the previous order staying execution of FWP's final order, (2) affirmed that AMI's permit cannot be renewed, and (3) ordered FWP to "immediately 'redeem possession of all wildlife obtained by capture or unlawful propagation.'" (Appendix A at 20) (citing and quoting *Mont. Code Ann. § 87-4-806 (2015)*)[3].

The district court did not address AMI's argument relating to entrapment by estoppel. Additionally, the district court relied on erroneous conclusions that neither AMI nor Hyde had contested the majority of the violations against it. These erroneous conclusions were made by the Hearings Examiner and continued

[3] None of the relevant Title 87 statutes have been amended since 1999. However, since the district court relied on the code in effect at the time of the violations, all citations are to the 2015 version of the MCA.

through each stage of the proceedings.

AMI and Hyde now appeal to address both the constitutional question of entrapment by estoppel and to correct the factual errors made at the beginning of the entire process.

Summary of the Arguments

The district court failed to consider AMI's argument on entrapment by estoppel. Entrapment by estoppel originates in the due process clause of the United States Constitution and equally so in the due process clause of the Montana Constitution. Because FWP's findings and conclusion were the result of entrapment by estoppel, the result of the FWP proceedings are in violation of a constitutional provision. Therefore, pursuant to *Mont. Code Ann. § 2-4-704*, the district court had the authority to reverse or modify FWP's decision.

Standards of Review

Judicial review of a final agency decision is conducted without a jury and confined to the record. *Williamson v. Mont. Public Service Comm'n*, 2012 MT 32, ¶ 25, 364 Mont. 128, 272 P.3d 71.

> The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced either because findings of fact upon issues essential to the decision were not made although requested, or because the administrative findings, inferences,

> conclusions or decisions are (i) in violation of constitutional or statutory provisions; (ii) in excess of statutory authority of the agency; (iii) made upon unlawful procedure; (iv) affected by other error of law; (v) clearly erroneous in view of reliable, probative, and substantial evidence on the whole record; or (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. (citing *Mont. Code Ann. § 2-4-704(2)*).

"A finding of fact is clearly erroneous if it is not supported by substantial evidence in the record, if the fact-finder misapprehended the effect of the evidence, or if a review of the record leaves the court with a definite and firm conviction that a mistake has been made." *Williamson*, ¶ 25.

"In reviewing conclusion of law, the court must determine whether the agency's interpretation and application of the law are correct." *Id.*

The above standards apply to both the district court and this Court. *Knowles v. State ex. rel. Lindeen*, 2009 MT 415, ¶ 23, 353 Mont. 507, 222 P.3d 595. While this Court "cannot substitute [its] judgment for that of the agency," it will also "not defer to an agency decision without a searching and careful review of the record to verify that the agency made a reasoned decision." *Bitterrooters for Planning, Inc. v. Montana Dept. of Envtl. Quality*, 2017 MT 222, ¶ 16, 388 Mont. 453, 401 P.3d 712.

Argument

I. Entrapment by Estoppel

A. Introduction

The defense of entrapment by estoppel originates in the Due Process Clause of the *Fourteenth Amendment* to the United States Constitution. *Raley v. Ohio*, 360 U.S. 423 (1959). It is the authority of the government official, whether apparent or actual, that is crucial to the entrapment by estoppel defense. *See Raley*; *Cox v. Louisiana*, 379 U.S. 59 (1965) (finding entrapment by estoppel where defendant was misled by "the highest police officials of the city," including the chief of police); *United States v. Penn. Indus. Chem. Corp.*, 411 U.S. 665 (1973) (reversing and remanding to allow presentation of entrapment by estoppel defense so defendant could argue long-standing regulations of the agency responsible for enforcing the statute denied it fair warning of what conduct the government intended to treat as criminal).

Because entrapment by estoppel is grounded in the *Fourteenth Amendment's* Due Process Clause, it is immaterial whether or not this Court has specifically recognized the defense in the past. The *Fourteenth Amendment* prohibits a state from depriving "any person of life, liberty, or property, without due process of law.

. . ." Article II, section 17 of the Montana constitution contains the same language. "No person shall be deprived of life, liberty, or property[4] without due process of law." Consequently, the defense of entrapment by estoppel is necessarily available to litigants in Montana because the *Fourteenth Amendment* guarantees the defense to citizens of all states.

B. Applicability or Inapplicability of Plain Error Review

Although the concept of estoppel was raised in administrative proceedings, the specific defense of entrapment by estoppel was not raised until the district court proceedings. Rather, the Hearings Examiner sought briefing on the concept of collateral estoppel as it related to the effect of the prior criminal conviction on the civil proceedings. Collateral estoppel and entrapment by estoppel are distinct concepts.

AMI and Hyde raised the argument of "estoppel by entrapment" for the first time in the Petition for Judicial Review (Petition for Judicial Review at 12). The Petition correctly notes the difference between prior estoppel arguments that were "bound by the common law," versus estoppel by entrapment. (Id. at 12-13).

[4]Although the *Fourteenth Amendment* contains an Oxford comma and *Art. II, § 17* does not, this Court has not found sufficient difference between the two clauses to warrant distinction. *See Tax Lien Servs. v. Hall*, 277 Mont. 126, 130, 919 P.2d 396 (1996).

Although AMI argued this case satisfied the requirements of both equitable estoppel and estoppel by entrapment, the district court ignored the latter[5] and focused only on the former.

Notwithstanding the provisions of *Mont. Code Ann. § 2-4-702(1)(b)*, judicial review allows a district court to analyze an agency decision if the substantial rights of the appellant have been prejudiced because the administrative conclusions and decision are in violation of constitutional provisions. *Mont. Code Ann. § 2-4-704*. AMI raised entrapment by estoppel as an example of a prejudice to AMI's substantial rights based a violation of a constitutional provision, i.e., the due process protections against entrapment by estoppel.

FWP did not address AMI's entrapment by estoppel argument when it filed its response to the Petition for Judicial Review. Rather, FWP focused solely on the question of equitable estoppel. Therefore, to the extent that *Mont. Code Ann. § 2-4-702(1)(b)* ostensibly precluded AMI from raising the entrapment by estoppel argument on judicial review, FWP did not invoke that statutory preclusion before the district court.

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[5]The district court did acknowledge that AMI had argued "estoppel by entrapment." (Appendix A at 6) (citing and quoting Petition for Judicial Review at 4).

Under these circumstances, the question of entrapment by estoppel does not require plain error review because it was raised as part of the argument for judicial review. However, should FWP now seek to argue that this Court must review the issue under plain error, AMI satisfies plain error review.

C. AMI Satisfies the Elements for Entrapment by Estoppel

AMI and Hyde have the burden of establishing entrapment by estoppel. *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000) (per curiam). "Entrapment by estoppel is the *unintentional* entrapment by an official who mistakenly misleads a person into a violation of the law." *Id.* (emphasis added).

It is error to deny a defendant a credible entrapment by estoppel defense. *United States v. Batterjee*, 361 F.3d 1210, 1219 (9th Cir. 2004). "A district court's determination that there exists no evidence sufficient to raise a valid defense is analogous to a determination that a jury instruction relating to a defendant's theory of the case is not warranted by the evidence. . . . We therefore review *de novo* the district court's decision to exclude evidence of an entrapment by estoppel defense." *United States v. Brebner*, 951 F.2d 1017, 1024 (9th Cir. 1991).

Unlike the six elements necessary to establish equitable estoppel under the

common law, entrapment by estoppel only has five elements.

> A defendant must show that (1) an authorized government official empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told [the defendant] the proscribed conduct was permissible, (4) that [the defendant] relied on the false information, and (5) that [the defendant's] reliance is reasonable if a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.

United States v. Batterjee, 361 F.3d at 1216-17 (internal quotations and citations omitted).

Common law equitable estoppel has been deemed "odious," "not favored," and only to be applied with "great care," *Fiers v. Jacobson*, 123 Mont. 242, 250-51, 211 P.2d 968 (1949). Entrapment by estoppel, on the other hand, is an affirmative defense that "rests on a due process theory which focuses on the conduct of the government officials rather than on a defendant's state of mind." *Brebner*, 951 F.2d at 1025. *See also United States v. Thompson*, 25 F.3d 1558, 1561 n. 2 (11th Cir. 1994) ("Entrapment by estoppel is an affirmative defense which, unlike the defense of entrapment, focuses on the actions of government officials and not on the defendant's predisposition.")

Another critical distinction between equitable estoppel and estoppel by entrapment is the burden required. "Clear and convincing evidence is necessary to

establish equitable estoppel." *Billings Post No. 1634, VFW of the United States v. Mont. Dep't of Revenue*, 284 Mont. 84, 90, 943 P.2d 517, 520 (1997). Entrapment by estoppel merely requires a defendant establish the defense by a preponderance of the evidence. *United States v. Stewart*, 185 F.3d 112, 124 (6th Cir. 1999); *see also United States v. Lane*, 2013 U.S. Dist. LEXIS 88376, *24, 2013 WL 3199841 D. Ariz. 2013 (citing and quoting *Stewart*); *United States v. W. Indies Transp*, 127 F.3d 299 (3d Cir. 1997).

Every adjudicative body to address AMI's claims of estoppel, including the district court, which was directly noticed of AMI's entrapment by estoppel defense, applied the higher burden of "clear and convincing evidence." (Appendix A at 18). Certainly, the claims of equitable estoppel were subject to the higher burden, but the district court's application of the higher burden was erroneous as applied to the entrapment by estoppel claim. Both the entrapment by estoppel claim and the erroneous application of the higher burden by the district court resulted in violation of AMI's constitutional rights as contemplated by MAPA. *Mont. Code Ann. § 2-4-704(2)(a)(i)*.

Critical to AMI and Hyde's case and the strict-liability provisions in *Mont. Code Ann. § 87-4-806*, entrapment by estoppel "can be raised as a defense to

offenses that do not require proof of specific intent." *Brebner*, 951 F.2d at 1025. *See also United States v. Hedges*, 912 F.2d 1397, 1405 (11th Cir. 1990) (noting that entrapment by estoppel is based on principles of fairness, not a defendant's mental state.) In other words, entrapment by estoppel involves the "concept of unintentional entrapment by an official who mistakenly misleads a person into a violation of the law." *United States v. Talmadge*, 829 F.2d 767, 773 (9th Cir. 1987).

In fact, the need to consider entrapment by estoppel is higher when the statute imparts strict liability for proscribed behavior. Strict liability offenses deprive defendants of a number of possible defenses to their actions. A court errs in failing to consider one of the few defenses available under a strict liability scheme, especially if evidence has been presented in support of that defense.

In *United States v. Penn. Indus. Chem. Corp.*, 411 U.S. 655 (1973), the United States Supreme Court held that it was error to deny the corporate defendant, PICCO, the right to present evidence that it had been affirmatively misled into believing that the law did not apply in a given situation by the responsible administrative agency . There, the defendant corporation was charged criminally in violation of § 13 of the Rivers and Harbors Act (the Act) for polluting the Monogahela River, a navigable water. Section 13 of the Act provided that "the

Secretary of the Army . . . may permit the deposit of refuse matter deemed by the Army Corp of Engineers not to be injurious to navigation provided application is made to [the Secretary] prior to depositing such material." *Id. at 658* (emphasis added).

PICCO discharged its refuse matter into the river without obtaining a permit. However, at trial, one of PICCO's defenses was that at the time of the discharge, "the Army Corp of Engineers had not established a formal program for issuing permits under § 13 and, moreover, [ ]the Corp consistently construed § 13 as limited to those deposits that would impede or obstruct navigation, thereby affirmatively misleading PICCO into believing that a § 13 permit was not required as a condition to discharges of matter involved" in the prosecution. *Id.* at 659-60.

In analyzing PICCO's entrapment by estoppel argument, the United States Supreme Court noted that the issue did not turn on whether PICCO's discharge did or did not fall under the prohibition of § 13. "[T]he issue here is not whether § 13 in fact applies to water deposits that have no tendency to affect navigation." *Penn. Indus. Chem. Corp.*, 411 U.S. at 670. In fact, the Court noted that the lower court agreed that § 13 "is to be read in accordance with its plain language as imposing a flat ban on the unauthorized deposit of foreign substances into

navigable waters regardless of the effect on navigation." *Id.* at 671. However, the Court acknowledged that despite the plain language, it was "undisputed that prior to December 1970 the Army Corp of Engineers consistently construed § 13 as limited to water deposits that affected navigation." *Id.* at 672.

Although it was prohibited from doing so, "PICCO offered to prove that, in reliance on the consistent longstanding administrative construction of § 13, the deposits in question were made in a good-faith belief that they were permissible under the law." *Id.* at 673. PICCO's defense was not that they were ignorant of the law or that the statute was impermissibly vague, rather that PICCO "was affirmatively misled by the responsible administrative agency into believing that the law did not apply in this situation." *Id.* at 674. The Court agreed.

As with AMI and FWP, the Court in *Penn. Indus. Chem. Corp.* acknowledged that "there can be no question that PICCO had a right to look to the Corps of Engineers' regulations for guidance." *Id.* at 674. Like FWP, "[t]he Corps is the responsible administrative agency under the . . . Act, and 'the rulings and interpretations and opinions of the [responsible agency] . . . , while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which . . . litigants may properly resort for guidance.'"

Penn. Indus. Chem. Corp., 411 U.S. at 674 (*citing and quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1940); *Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 499 (1958)).

As to the regulations, the Court concluded that they "did not themselves purport to create or define the statutory offense in question, [but] it is certainly true that their designed purpose was to guide a person as to the meaning and the requirements of the statute." *Penn. Indus. Chem. Corp.*, 411 U.S. at 674 (internal citation omitted). "[T]o the extent that the regulations deprived PICCO of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution." *Id.* The statutes, the regulations, and the Corps of Engineers formed for PICCO a triumvirate to guide the corporation toward law abiding behavior.

AMI's situation differs from PICCO only in regards to which member of the triumvirate deprived it of notice. For AMI, the issue was not with the regulations or the statute, but with FWP's inconsistent enforcement of both.

Throughout the entirety of the revocation proceedings, both AMI and Hyde maintained that the previous FWP Officer, Tim Feldner, had provided AMI with

an "opportunity to correct policy." (Appendix B at 109-110). Hyde testified that his understanding was that the opportunity to correct was the policy of FWP and had been for "27 years." (Appendix B at 110). Demetri Price, an employee of AMI, also testified that his understanding of FWP policy was that it provided an opportunity to correct regulatory violations. (Appendix B at 163). The United States Department of Agriculture, which also regulates AMI, provides an opportunity to correct. (Appendix B. at 104-106).

The first Hyde knew that FWP's opportunity to correct policy was either non-existent or had been removed was when he received his revocation notice after an inspection. (Appendix B at 110) That revocation was the first AMI had received in 27 years of business.[6] (Appendix B at 85, 87).

FWP's Commercial Wildlife Permit Manager, Mike Lee, testified at the AMI's revocation hearing. (Appendix B at 47). He described one of his duties was "to ensure statutes, administrative rules are applied consistently throughout the state." (Appendix B at 48). Mr. Lee communicated with AMI regularly, "mostly through email." (Id.) Mr. Lee affirmed that he had never personally had

[6]AMI's roadside menagerie license was "lost" once before because they had "lost their USDA exhibitor's license." However, the license "wasn't revoked." (Appendix B at 66).

discussions with AMI about the conditions of the facility or issues following the terms of AMI's permit. (Appendix B at 55).

Mr. Lee was present at one inspection in 2013 and one in 2015. (Appendix B at 62). Mr. Lee affirmed that he had never cited AMI -- nor any menagerie -- for mistreatment of animals or even warned them about mistreatment of animals. (Appendix B at 85).

The following exchange between Mr. Lee and AMI's counsel is relevant for the argument on entrapment by estoppel.

> Counsel: For example, in 2013, Animals of Montana passed their inspection, so there were not violations.
>
> Lee: The inspection isn't a 'pass' or 'no pass', it's to address concerns that would be found inside the menagerie.
>
> Counsel: Okay. So like 'needs improvement', for example?
>
> Lee: Yes.
>
> Counsel: An then they would improve it?
>
> Lee: Yes.

(Appendix B at 87). This exchange refutes the findings by the Hearing Examiner that "AMI did not establish FWP employed an official or de facto 'opportunity to correct' policy." (Appendix D at 7).

Mr. Lee's testimony also undermines the district court's reliance on the Hearing Examiner's findings. "Furthermore, the hearing officer's order is clear that Petitioner 'did not establish the existence of an 'opportunity to correct' policy, let alone by clear and convincing evidence, and that Petitioner "cannot establish element five' of estoppel. These findings of fact and related conclusions of law were upheld in the appeal to FWP's director." (Appendix A at 18).

Hyde testified about an FWP report that was generated after an inspection of AMI on November 17, 2015. In discussing the report, counsel asked Hyde if he was "aware that in that document there were several observations where it lists quote, unquote 'needs improvement.'" (Appendix B at 108). Hyde affirmed he was aware of that language. He testified that his understanding of the phrase "needs improvement," was that "they [FWP] want things changed or they don't like the way, for example the water dish had urine in it or feces in it." (Id.) Hyde testified that he fixed the problem with the wolves' water dishes. (Appendix B at 109).

Hyde again affirmed it was "his understanding of needs improvement" that he took that "to fall within the quote unquote 'opportunity to correct policy that was being implemented by Officer Feldner and then also inherited by Warden

Lee.'" (Appendix B at 109-110). Again, that testimony belies the findings of both the Hearing Examiner and the district court that AMI did not produce any evidence of the "opportunity to correct" policy which forms the basis of the entrapment by estoppel argument.

Hyde provided additional evidence of the opportunity to correct when he recounted an FWP inspection from 2004 or 2005.

> I couldn't tell you what year it was. I want to say maybe 2004, maybe, or 2005, maybe even earlier than that. I had a field officer by the name, I apologize because I don't remember his name. I think his last name was Larson or Anderson. It was Anderson. And he had looked at the barricades and felt there should be another padlock, another latching mechanism put into the bottom so there would be three instead of two.

(Appendix B at 114). Given the opportunity to correct this perceived deficiency, Hyde added the third padlock. (Id.)

Like Mr. Lee, Hyde also testified about the 2013 inspection. Hyde was shown pictures that were taken in 2019 (Appendix B at 114) (referencing FWP Exhibit 19). Those photographs depicted "the same conditions that were present in the 2013 inspection." (Id). Despite the presence of "dummy locks," and "things like that" in 2013, AMI was not notified by FWP that "those conditions were unacceptable." (Appendix B at 115). Without notice, these same issues,

however, suddenly became mandatory revocable violations after the 2015 inspection.

This Court has held that it is "axiomatic that 'due process is flexible and calls for such procedural protections as the particular situation demands.'" *Bates v. Neva*, 2013 MT 246, ¶ 14, 371 Mont. 466, 308 P.3d 114 (*citing and quoting State v. West*, 2008 MT 338, ¶ 32, 346 Mont. 244, 194 P.3d 683) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). An "asserted denial of due process of law is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking the universal senses of justice, may, in other circumstances and in the light of other considerations, fall short of such denial." *Id*, ¶14 (internal citations and quotations omitted).

This flexibility should be applied to AMI's and Hyde's proceedings, especially at the district court level. At each level of review, AMI and Hyde presented evidence of continuous operations for almost three decades. Evidence was also presented that prior inspections had resulted in findings of "needs improvement," but that at no point prior to 2015 did FWP invoke the mandatory-revocation-of-the-permit language found in *Mont. Code Ann. § 87-4-806*. In fact,

Mr. Lee's testimony that an inspection "isn't a 'pass' or 'no pass'" is false if any violation results in mandatory revocation. (Appendix B at 87). If there is no opportunity to correct, then an inspection is necessarily either "pass" or "no pass" and violations require mandatory revocation.

If *Mont. Code Ann. § 87-4-806* is strictly applied, there can be no "needs improvement." There can only be a violation and mandatory revocation. Consequently, both the Hearing Examiner and the district court erred in concluding "AMI did not establish FWP employed an official or de facto 'opportunity to correct.'" (Appendix D at 7). To the contrary, not only did AMI establish, at minimum, the existence of a de facto policy, but it also presented a preponderance of evidence that FWP had engaged in 27 years of entrapment by estoppel.

Given the law on entrapment by estoppel and the facts presented at the hearing, we return to the district court's decision. (Appendix A). The district court could not "substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." *Mont. Code Ann. § 2-4-704*. However, the court did have the discretion to reverse or modify the agency's decision "if substantial rights of the appellant have been prejudiced because . . . the

administrative findings, inferences, conclusions, or decisions are . . . in violation of a constitutional or statutory provision." *Mont. Code Ann. § 2-4-704*. While the court's review must be confined to the record, the record here establishes by a preponderance of the evidence that AMI's due process right to be free from entrapment by estoppel was violated. Given that constitutional violation, the district court had both the authority and the duty to reverse or modify the agency's decision.

The district court's failure to address or recognize prejudice of AMI's substantial rights via a due process violation warrants reversal by this Court. At minimum, due process requires "a full hearing before a neutral and detached hearing body" for which the individual has "been given written notice" of the claims against him and "an opportunity to be heard in person and to present witnesses and to confront and cross-examine adverse witnesses." *State v. Howell*, 222 Mont. 136, 139, 720 P.2d 1174, 1176 (1986) (citing *Morrissey* and discussing minimal due process protections for parolees). Concomitant with the opportunity to be heard, presentation of witnesses, and cross-examination of adverse witnesses is the opportunity to present a defense against the claims against him. *See e.g.*, *Washington v. Texas*, 388 U.S. 14, 19 (1967) ("The right to offer the testimony of

witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts. . . .")

Although AMI and Hyde were allowed to present their defense of entrapment by estoppel, the district court failed to address it. The due process protections are rendered meaningless if the court fails to address them, especially when the court is tasked with determining whether an agency decision was rendered in violation of a constitutional provision and whether an appellant suffered a prejudice of his substantial rights. *Mont. Code Ann. § 2-4-704(2).*

The issue of entrapment by estoppel was plainly before the district court, and the district court failed to address it. That was error and warrants reversal of the district court's decision.

D. Plain Error Review for the Sake of Argument

Even assuming *arguendo* the plain error standard applies, reversal is still warranted. Violation of AMI's due process right to be free from entrapment by estoppel implicates a fundamental right. Second, the record must leave this Court firmly convinced "that a failure to review the" the due process error "would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the . . . proceeding, or compromise the integrity of the judicial

process." *State v. Favel*, 2015 MT 366, ¶ 23, 381 Mont. 472, 362 P.3d 1126 (setting forth the elements of plain error review).

The first element of plain error review is satisfied based on the fundamental right at issue. Here, the fundamental right at issue is Hyde's right to pursue life's basic necessities, i.e., the opportunity to pursue or maintain his employment. *Wadsworth v. State*, 275 Mont. 287, 299, 911 P.2d 1165, 1172 (1996) *(citing Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 604 (1982)). For 27 years AMI has been Hyde's work and employment through which he has exercised his right to pursue basic necessities as guaranteed by *Art. II, section 3* of the Montana Constitution.

The district court's failure to recognize or even review the question of estoppel by entrapment satisfies the second element of plain error in that it leaves unsettled the question of the fundamental fairness of the judicial review proceeding.

The district court's analysis of estoppel was limited to the elements of equitable estoppel and the absence of clear and convincing evidence. Wholly left unaddressed was whether AMI was prejudiced by FWP's entrapment by estoppel. This issue was raised in the district court and review of the record demonstrates

that there was a preponderance of the evidence that an entrapment by estoppel violation occurred. At minimum, the district court's failure to address the issue raises questions about the fundamental fairness of the judicial review proceeding, not to mention the FWP revocation proceedings.

Given these circumstances, AMI seeks reversal of the district court's decision on judicial review based on plain error. The Court should remand the case back to the district court with instructions to consider AMI's entrapment by estoppel argument.

Conclusion

For almost 30 years AMI has been Hyde's life and occupation. There is no question that the State, through FWP, has the authority to regulate AMI. However, it must also be recognized that *Art. II, § 3* of the Montana Constitution guarantees Montanans the right to pursue "life's basic necessities . . . in all lawful ways." This includes a citizen's right to pursue employment, *Wadsworth v. State*, 275 Mont. 287, 299, 911 P.2d 1165, 1172 (1996). This right, combined with due process interests, necessarily affords Hyde and AMI the ability to present all viable defenses to the claims against them to preserve 27 years of work and livelihood.

Instead of focusing on the most viable defense–entrapment by estoppel–the

district court focused on a common law defense upon which legal scorn has been heaped for years–equitable estoppel. In failing to address AMI's entrapment by estoppel claim, the district court ultimately left unaddressed the prejudice to AMI's substantial rights that results from FWP's actions.

Therefore, Hyde and AMI request this Court remand the case to the district court for consideration and, if necessary, factual development of the entrapment by estoppel claim. Hyde and AMI have no doubt that when the entrapment by estoppel claim is reviewed, the district court will reverse FWP's decision consistent with its authority in *Mont. Code Ann. § 2-4-704*.

Respectfully submitted this 9th day of November, 2020.

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Certificate of Compliance

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Opening Brief is printed with proportionately-spaced Equity Text A typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words. The exact word count, as calculated by my WordPerfect software and excluding tables and certificates is 6,100.

Dated this 9th day of November, 2020.

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CERTIFICATE OF SERVICE

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