# In the Supreme Court for 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 Reply Brief

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

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### *I. Introduction*

Animals of Montana (AMI) appeals from the revocation of its roadside menagerie permit. AMI's argument is that the district court, which upheld the revocation after judicial review, either failed to consider AMI's entrapment by estoppel argument or erroneously conflated entrapment by estoppel with equitable estoppel.

The Department has responded and AMI now replies.

### *II. Argument*

FWP is correct that AMI and Hyde did not contest the lion's share of the violations alleged. That, however, is the point of an entrapment by estoppel due process defense. For entrapment by estoppel to apply, there must be some wrongdoing present. However, that wrongdoing is excused on due process grounds, based on the action or inaction of a government official. That is what happened with AMI, and the fact that neither Hyde nor AMI did not contest the violations only serves to highlight the applicability of the defense.

The law is replete with situations where an offender's wrongdoing is excused under entrapment by estoppel. In *United States v. Batterjee*, 361 F.3d 1210

(9th Cir. 2004), the wrongdoing was that a defendant who was ineligible to purchase a firearm did so after truthfully disclosing all information required to a federal licensed firearms dealer. The dealer erroneously told the defendant that the defendant could legally possess a pistol. The Court of Appeals for the Ninth Circuit reversed the defendant's conviction holding the district court erred in rejecting the defendant's credible entrapment by estoppel defense. *Batterjee*, 361 F.3d at 1218.

*Batterjee* is instructive for two reasons. First, it is illustrative that proof of wrongdoing does not remove constitutional due process protections. FWP castigates AMI for violating "laws and rules pertaining to [its] business, and now seeks to justify [its] transgressions through an argument that enforcement of state regulations pertinent to his business was unconstitutional." (Appellee's Br. at 1). AMI is absolutely not arguing that enforcement of regulations is unconstitutional. What he is arguing, like *Batterjee*, is that FWP's conduct led him to believe he would have the opportunity to correct violations. During the agency proceedings, he presented more than sufficient evidence that he had been previously given that opportunity.

*Batterjee*'s second point is to distinguish a defense of entrapment with a

defense of entrapment by estoppel. The former focuses on the subjective intent of the defendant. The latter "focuses on the conduct of the government officials rather than the defendant's state of mind." *Id.* (citing *United States v. Brebner*, 951 F.2d 1017, 1025 (9th Cir. 1991)). For the Ninth Circuit, the distinctions were important and warranted reversal. The same holds true for AMI.

FWP argues the district court "considered and correctly addressed AMI's arguments regarding estoppel." (Appellee's Br. at 8). This is true for AMI's argument of equitable estoppel. It is not true for AMI's entrapment by estoppel defense. As in *Baterjee*, there are distinct concepts and each warrants full and adequate consideration. The district court's analysis focused almost exclusively on equitable estoppel.

As discussed in AMI's opening brief, the burden of proof for equitable estoppel is higher than it is for entrapment by estoppel. (Appellant's Br. 15). However, as FWP correctly notes, the district court "responded to AMI's arguments and contentions jointly." (Appellee's Br. at 8). By responding jointly, the district court's findings do not distinguish between equitable estoppel and entrapment by estoppel. Consequently, the court's ruling failed to address the differing standards of proof for each of the respective defenses.

Evidence that the district court either applied the incorrect standard of proof to its entrapment by estoppel analysis or failed to consider entrapment by estoppel at all is found in the court's conclusion that "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* . . . ." (Id.)(emphasis added). In all twenty pages of the district court's order, there is no mention of the "preponderance of the evidence" standard.

The State correctly sets out for this Court's applicable standards of review. (Appellee's Br., 6-7). The question for this Court is: Whether the agency and the district court's interpretation and application of the law are correct. A district court may reverse or modify the decision of an agency if the Agency's decision was affected by legal error. The district court's failure to apply the correct burden of proof to the correct defense was an incorrect application of the law. "This difference in the burden of proof is reason alone not to apply the presumption of correctness in this case." *Burton v. Davis*, 816 F.3d 1132, 1153 (9th Cir. 2016).

FWP acknowledges that AMI addressed entrapment by estoppel and also acknowledged that the defense has not been specifically recognized in Montana. However, FWP then faults AMI for presenting "very little precedent supporting

the doctrine, and presented no credible evidence that FWP's conduct resulted in any sort of estoppel doctrine being met." (Appellee's Br. 9). The first proposition is true but results from the fact that, notwithstanding its constitutional due process foundation, this Court has not recognized the defense of entrapment by estoppel. FWP's second contention, that AMI presented no credible evidence, is simply incorrect.

It is noteworthy that the district court made no findings on the credibility of AMI's evidence. At worst, for Hyde, the district court found the briefing on judicial review deficient. (Appendix A, 17; Appellee's Br., 9). This is not the same as finding the underlying evidence incredible.

The Agency made three credibility findings (one of which found Hyde's testimony credible), and none of those determinations were relevant to Hyde's testimony pertaining to entrapment by estoppel. However, credibility or its absence must be evaluated in the context of the test being applied. For example, FWP appears to overstate the extent to which AMI had to demonstrate entrapment by estoppel. FWP maintains that "AMI was repeatedly reminded of the standards they must meet — and there was no reasonable reliance on any FWP official's statement that would excuse such conduct." (Appellee's Br. at 11). FWP's

argument continues: "The record shows no instance where FWP made any *false representation or concealed any material facts from AMI.*" (Id.) (emphasis added). Entrapment by estoppel can be established by more (or less) than a false representation or concealment of material facts.

*Batterjee* and other Ninth Circuit cases emphasize that entrapment by estoppel is an affirmative defense focusing on the actions of government officials. *See United States v. Brebner*, 951 F.2d 1017, 1025 (9th Cir. 1991). This is not a minority view. The Court of Appeals for the Second Circuit also acknowledges that a defendant may prevail on a defense of entrapment by estoppel if "the government, by its own actions induce him to do [criminal conduct] and let him to rely reasonably on his belief that his actions would be lawful by reason of the government's *seeming* authority." *United States v. Giffen*, 473 F.3d 30, 41 (2d Cir. 2006) (emphasis in original).

Because the crux of entrapment by estoppel is reasonableness of the defendant's belief, the government's action or inaction which gives rise to that belief need not meet the high threshold of being a "false representation" or concealment of material fact. (Appellee's Br. at 11). Indeed, government inaction could also give rise to a reasonable belief by AMI that violations that were

corrected would not result in the automatic and mandatory revocation of its license. *See Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 48, 326 Mont. 304, 109 P.3d 257 (Nelson, J., concurring) (stating that a choice not to act is an act itself).

Before the hearing examiner, Troy Hyde's testimony provided, by a preponderance of evidence, verification of twenty-plus years of a *de facto* opportunity to correct policy was either condoned or promoted by FWP. Hyde testified he received his first license in 1992 and worked with FWP Officer Feldner. (Appendix B at 102). Hyde estimated he worked with FWP Officer Feldner for twenty years. (Id.) For AMI's entrapment by estoppel argument to fail is to believe that AMI went over 20 years without a single violation, only to suddenly rack up "over two dozen violations" in 2015. (Appellees' Br. at 1). Hyde, himself, testified that AMI had past "inconsistencies" with FWP. (Appendix B. at 111). Obviously, mandatory revocation had not occurred in the past.

At the hearing, Hyde testified extensively about the past history of his ability to correct provided in the past by both the State and the USDA. See Appellant's Appendix B at 104-105; 107-108). Even the FWP report from a November 17, 2015 inspection indicates that certain portions of AMI's operation "needs

improvement." (Appendix B, 108). With entrapment by estoppel premised on the reasonableness of the defendant's belief based on government action, then an FWP form which reads "needs improvement," is reasonably read as an opportunity to correct. This is especially true considering whether one should reasonably believe that the alternative is mandatory revocation of the license upon a single violation. All of these beg the question: If mandatory revocation is a result of any violation, why does the form reference the need for improvement?

Hyde's testimony and other evidence presented at the hearing established the defense of entrapment by estoppel by a preponderance of the evidence. The district court erred in applying the clear and convincing standard and conflating equitable estoppel and entrapment by estoppel.

The State contends the "District Court's Order was thorough, well-supported by the record, and correct on the law. . . ." (Appellee's Br. at 8). AMI agrees with the first two propositions, but disagrees with the third. Unfortunately for the State, the fact that the district court was incorrect on the law proves fatal to its argument. Entrapment by estoppel and equitable estoppel are simply too distinct, from their respective elements to their burdens of proof. Most important is the fact that the former is based in the due process clauses of two constitutions

while the latter is disfavored by case law. It was incumbent on the district court to apply distinct law to two distinct legal principles. This is especially true given the ramifications of the Agency and court's decisions–mandatory revocation of AMI's license, the loss of a 27-year business, and the loss of thousands of dollars of assets.

## Conclusion

It is to FWP's credit that it tried for so long to work with AMI and Hyde. For over twenty years, Hyde ran AMI successfully working with both State and Federal agencies. For over twenty years, Hyde has bonded with his animals and created an environment to foster their safety and ethical management. One example is a grizzly bear, Adam, that Hyde has had since he was a cub. Beginning over twenty years ago, Hyde bottle-fed Adam and raised him to be a well-trained animal for casting in films and photo-shoots. Hyde has the same connection to each-and-every-one of his animals. And for all that time, FWP balanced its regulatory duties with an understanding that AMI did not fit squarely into any regulatory class.

AMI simply seeks recognition that for those twenty-plus years, FWP inspected, found fault, provided an opportunity to correct, and did not commence mandatory revocation. That is the heart of entrapment by estoppel, it is an

affirmative defense that allows a defendant to alert the fact finder that it had played by one set of rules at the State's behest for two decades, and now -- without warning -- the rules were changed. It was incumbent on the district court to, at least, acknowledge the defense and apply the appropriate standards and analysis.

Therefore, Hyde and AMI respectuflly request this Court reverse the district court's decision and remand the case for consideration of the entrapment by estoppel defense.

Respectfully submitted this 22nd day of January, 2021.

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## CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Reply 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 5,000 words. The exact word count, as calculated by my WordPerfect software and excluding tables and certificates is 1,970.

Dated this 22nd day of January, 2021.

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## CERTIFICATE OF SERVICE

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