Case No. 09-102275-A

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IN THE COURT OF APPEALS

OF THE

STATE OF KANSAS

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IN THE MATTER OF THE CONSERVATORSHIP

OF FLOYD BOGNER

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# BRIEF OF APPELLANT, RICHARD GREEVER

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Appeal from the District Court of Harvey County, Kansas
The Honorable Joseph Dickinson
Judge of the District Court
District Court Case No. 01PR102

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Michael P. Whalen, Sup. Ct. No. 16611
Law Office of Michael P. Whalen
6235 W. Kellogg
Wichita, Kansas 67209
Telephone: (316) 265-2598

Jay Sizemore, Sup. Ct. No. 20395
121 E. 5th - P.O. Box546
Newton, KS 67114
Telephone: (316) 283-1550
ATTORNEYS FOR APPELLANT, RICHARD GREEVER

**TABLE OF CONTENTS**
**AND**
**INDEX OF AUTHORITIES**

Case No. 09-102332-A

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IN THE COURT OF APPEALS

OF THE

STATE OF KANSAS

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IN THE INTEREST OF KAT

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# BRIEF OF APPELLANT, NATURAL MOTHER

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Appeal from the District Court of Sedgwick County, Kansas
The Honorable Daniel Brooks
Judge of the District Court
District Court Case No. 08JC24

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Michael P. Whalen, Sup. Ct. No. 16611
Law Office of Michael P. Whalen
6235 W. Kellogg
Wichita, Kansas 67209
Telephone: (316) 265-2598
ATTORNEY FOR APPELLANT, NATURAL MOTHER

**TABLE OF CONTENTS**
**AND**
**INDEX OF AUTHORITIES**

**Case No. 07-98275-A**

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IN THE COURT OF APPEALS

OF THE

STATE OF KANSAS

---

THE STATE OF KANSAS,

Plaintiff/Appellee,

-vs-

JOHN DON LAYTON,

Defendant/Appellant,

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# BRIEF OF APPELLANT

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Appeal from the District Court of McPherson County, Kansas
The Honorable Carl B. Anderson
Judge of the District Court
District Court Case No. 01 CR 3

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Michael P. Whalen, Sup. Ct. No. 16611
Law Office of Michael P. Whalen
229 E. William, Ste. 300
Wichita, Kansas 67202
Telephone: (316) 265-2598
ATTORNEY FOR PETITIONER/APPELLANT JOHN DON LAYTON

**TABLE OF CONTENTS**
**AND**
**INDEX OF AUTHORITIES**

Case No. 07-98275-A

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IN THE COURT OF APPEALS
OF THE
STATE OF KANSAS

---

THE STATE OF KANSAS,

Plaintiff/Appellee,
-vs-
JOHN DON LAYTON,

Defendant/Appellant,,

---

# BRIEF OF APPELLANT

---

Appeal from the District Court of McPherson County, Kansas
The Honorable Carl B. Anderson
Judge of the District Court
District Court Case No. 01 CR 3

## I.

## NATURE OF THE ACTION

This is a direct appeal to the Kansas Court of Appeals following the finding of the effective assistance of counsel following a remand to the district court for an evidentiary hearing pursuant to K.S.A. 60-1507.

## II.

## ISSUE ON APPEAL

**A. The district court erred by finding the Appellate Defenders Office was effective in their handling of Mr. Layton's direct appeal despite their failing to properly present and preserve the McAdam compounding argument for review by the Court of Appeals and Supreme Court.**

## III.

## FACTS OF THE CASE

John Don Layton filed a motion to correct an illegal sentence claiming he was entitled to be resentenced pursuant to State v. McAdam, 277 Kan. 136, 83 P.3d 161 (2004), and also contended his appellate counsel was ineffective in failing to raise a McAdam argument on direct appeal. The motion was summaryily dismissed by the district court. Mr. Layton appealed the finding of the district court.

On appeal, Mr. Layton argued McAdam should be applied to his sentence because his case did not involve a guilty plea or favorable plea agreement and because his case was on direct appeal at about the same time as McAdam. The Supreme Court granted petitions for review in Layton and McAdam on July 9, 2003. Layton's case was affirmed in State v. Layton, 276 Kan. 777, 80 P.3d 65 (2003), and then the mandate was issued on January 5, 2004. McAdam was not decided until January 30, 2004.

This Court found that Layton's direct appeal was not still pending when McAdam came down and despite the close proximity in time between Layton and McAdam, Layton's direct appeal was final when McAdam was decided. The trial court did not err in declining to apply McAdam retroactively to Layton's sentence. State v. Layton, 141 P.3d 525 (Kan.App. 2006), Docket No. 93186.

On the ineffective assistance of counsel issue Mr. Layton contended his appellate counsel was ineffective in failing to raise a McAdam argument on direct appeal. He argued that because he and McAdam were both represented by the ADO at about the same time, appellate counsel's failure to preserve the McAdam issue was unreasonable and, therefore, prejudicial.

In his direct appeal to this court, Layton's ADO lawyer argued a defendant sentenced for

manufacturing methamphetamine under the drug severity 1 felony provision of K.S.A. 65-4159 should be sentenced instead under the misdemeanor provision of 65-4127c. This Court rejected Layton's argument. See the modified opinion in State v. Layton, 31 Kan.App.2d 350, 65 P.3d 551 (2003). The sole issue on review was whether the trial court erred in imposing a severity level 1 felony sentence. The Supreme Court affirmed on the issue. State v. Layton, 276 Kan. 777, 80 P.3d 65 (2003). State v. Layton, 141 P.3d 525 (Kan.App. 2006), Docket No. 93186.

Meanwhile, a different argument was being pursued by another ADO lawyer in State v. McAdam, 31 Kan.App.2d 436, 66 P.3d 252 (2003), aff'd in part, rev'd in part 277 Kan. 136, 83 P.3d 161 (2004). There, counsel argued a defendant sentenced for manufacturing under the drug severity 1 felony provision of K.S.A. 65-4159 should be sentenced instead under the drug severity 3 felony provision of K.S.A. 65-4161. This Court rejected the argument. McAdam, 31 Kan.App.2d at 447. On review, the Supreme Court reversed this Court's McAdam decision, holding that K.S.A. 65-4159 and 65-4161 could be identical offenses. Accordingly, a defendant convicted for methamphetamine manufacture under 65-4159 and sentenced for a drug severity level 1 felony must instead be sentenced for a severity level 3 felony under 65-4161. McAdam, 277 Kan. at 146-47.

In Laymon v. State, 280 Kan. 430, 439-40, 122 P.3d 326 (2005), The Supreme Court held that appellate counsel's failure to preserve the McAdam argument was objectively unreasonable since "the state of the developing Kansas law counseled in favor of preserving the line of argument; and his lawyer, particularly given his colleagues' involvement in McAdam, can be charged with knowledge of the exact status of that law at the time." 280 Kan. at 444. Pursuant to Laymon, this Court reversed and remanded Mr. Layton's case for a hearing to determine whether Layton's appellate counsel was ineffective. State v. Layton, 141 P.3d 525

(Kan.App. 2006), Docket No. 93186.

An evidentiary hearing was held and Mr. Randall Hodgkinson of the ADO testified. Mr. Hodgkinson testified that the compounding (McAdam) issue was developed following the first opinion issued by this Court in Mr. Layton's direct appeal. The issue was then incorporated in Mr. Layton's motion for reconsideration, but was not addressed by the Court of Appeals in their opinion and the Supreme Court held the issue was not properly preserved and refused to review the issue. ( R. IX, 23-24).

Mr. Hodgkinson testified that the failure to raise the compounding issue in a meaningful manner before the Court of Appeals prevented the Supreme Court from being able to review that issue in Mr. Layton's case. ( R. IX, 11-12). Mr. Hodgkinson testified that he should have filed a motion to file a supplemental brief in Mr. Layton's case as they had in McAdam and, if the motion had been granted, the supplemental brief would have preserved the issue for review for the Supreme Court. ( R. IX, 34).

Mr. Hodgkinson testified that he believed he had been ineffective in representing Mr. Layton based on the difference in outcome between Mr. Layton's and Mr. McAdam's cases. ( R. IX, 14). Mr. Hodgkinson testified that there was a good and sufficient reason to file a supplemental brief in Mr. Layton's case because following the first Court of Appeals decision in Mr. Layton's case, it was extremely apparent to Mr. Hodgkinson and the other lawyers in the ADO that there was an issue, the compounding issue that would be a deciding issue. ( R. IX, 15). Mr. Hodgkinson testified that any time his office knows about an issue and failed to raise it in a manner that would preserve the issue, that he, and his office, were ineffective. ( R. IX, 16). Mr. Hodgkinson testified that even though the Court of Appeals had rejected the compounding issue in McAdam, that should not have prevented the ADO from preserving the issue in Mr.

Layton's case because the job of the ADO was to preserve issues forward. ( R. IX, 30). Mr. Hodgkinson state that, in his opinion, after the first Layton opinion, that it was the obligation of his office to preserve the compounding issue. ( R. IX, 31).

In response to a question from the court, Mr. Hodgkinson state that he should have tried to file a supplemental brief or a motion for a supplemental brief in Mr. Layton's case. ( R. IX, 33). Mr. Hodgkinson stated that at the time of filing the motion for reconsideration, that he believed that to be the proper procedure for raising and preserving the issue.

The district court found that there were no other actions that the Appellate Defender's Office could have taken beyond what efforts they had already made in the case as they raised the McAdam argument before the Court of Appeals once the issue was identified; the issue was raised in the petition for review and the issue was raised again following oral argument in the Supreme Court. The district court also found that the failure to raise the McAdam issue in a motion for reconsideration was not ineffective because at that time, there was no reason for the ADO to believe that a different result would have occurred and that it would have been sheer speculation that filing a motion for reconsideration would have allowed for a similar finding in a different case to change the law as it related to Mr. Layton. ( R. I, 137).

A timely Notice of Appeal was filed and this brief follows.

## IV.

## ARGUMENTS AND AUTHORITIES

### A. The district court erred by finding the Appellate Defenders Office was effective in their handling of Mr. Layton's direct appeal despite their failing to properly present and preserve the McAdam compounding argument for review by the Court of Appeals and Supreme Court.

1.Standard of Review

When an evidentiary hearing has been conducted in the district court, the standard of review for an appeal from a denial of a K.S.A. 60-1507 motion is for the appellate court to determine whether the factual findings of the district court are sufficient to support its conclusions of law. Lumley v. State, 29 Kan.App.2d 911, 913, 34 P.3d 467 (2001), rev. denied 273 Kan. 1036 (2002).

2.The finding of the district court was directly contradicted by the testimony of Mr. Hodgkinson.

The district court found that there were no other actions that the Appellate Defender's Office could have taken beyond what efforts they had already made in the case as they raised the McAdam argument before the Court of Appeals once the issue was identified; the issue was raised in the petition for review and the issue was raised again following oral argument in the Supreme Court. ( R. I, 137).

However, Mr. Hodgkinson testified that the failure to raise the compounding issue in a meaningful manner before the Court of Appeals prevented the Supreme Court from being able to review that issue in Mr. Layton's case. ( R. IX, 11-12). Mr. Hodgkinson testified that he should have filed a motion to file a supplemental brief in Mr. Layton's case as they had in McAdam and, if the motion had been granted, the supplemental brief would have preserved the issue for review for the Supreme Court. ( R. IX, 34).

Granted, it is unknown whether the Court of Appeals would have allowed for the supplemental filing following the issuance of the first decision. But, the lone witness and uncontroverted evidence from Mr. Hodgkinson was that the failure to request supplementation was crucial and that it was ineffective assistance of counsel not to at least attempt to further

supplement the record and the argument beyond the mere mention of the issue in the motion for reconsideration. the testimony at the evidentiary hearing by Mr. Hodgkinson was uncontested when he said that he believed that the failure to incorporate the identical elements issue in a manner that would have allowed review of the matter by the Supreme Court was ineffective assistance of counsel. On this point alone, this Court can find that Mr. Layton received ineffective assistance of counsel. That testimony stands uncontroverted. "Trial courts cannot disregard uncontroverted testimony unless it is shown to be untrustworthy. See In re Adoption of W.J., 262 Kan. 788, 795, 942 P.2d 37 (1997)." Mullins v. State, 30 Kan.App.2d 711, 717 (2002).

Further, the filing of a request for filing either a supplemental brief and/or a motion for reconsideration following the decision of the Supreme Court would likely have caused enough of a delay that would have allowed Mr. Layton's case to still be pending at the time of the McAdam opinion, which followed the mandate in Mr. Layton's case by a scant twenty-five days.

In Laymon v. State, 280 Kan. 430, 439-40, 122 P.3d 326 (2005), The Supreme Court held that appellate counsel's failure to preserve the McAdam argument was objectively unreasonable since "the state of the developing Kansas law counseled in favor of preserving the line of argument; and his lawyer, particularly given his colleagues' involvement in McAdam, can be charged with knowledge of the exact status of that law at the time." 280 Kan. at 444.

Mr. Hodgkinson testified that he believed he had been ineffective in representing Mr. Layton based on the difference in outcome between Mr. Layton's and Mr. McAdam's cases. ( R. IX, 14). Mr. Hodgkinson testified that there was a good and sufficient reason to file a supplemental brief in Mr. Layton's case because following the first Court of Appeals decision in

Mr. Layton's case, it was extremely apparent to Mr. Hodgkinson and the other lawyers in the ADO that there was an issue, the compounding issue that would be a deciding issue. ( R. IX, 15). Mr. Hodgkinson testified that any time his office knows about an issue and failed to raise it in a manner that would preserve the issue, that he, and his office, were ineffective. ( R. IX, 16).

Again, this testimony was uncontroverted and the district court was incorrect in going outside the evidence presented at the hearing and speculating that the ADO was not ineffective because there was nothing else that they could have done. That finding by the district court directly contradicted the only evidence and testimony that was put before the court.

As such, the district court's factual findings were incorrect and these incorrect factual findings of the district court led it to make incorrect conclusions of law. This Court should, based upon the evidence at the hearing from Mr. Hodgkinson, reverse the findings of the district court and remand Mr. Layton's case for resentencing in compliance with the ruling in McAdam.

If Mr. Hodgkinson had effectively preserved the compounding issue or taken action to properly preserve the issue by either requesting to file a supplemental brief or filing a motion for reconsideration by the Supreme Court, the issue would have either been decided in Mr. Layton's favor or the case would still have been live at the time of the McAdam decision. Thus, both prongs of ineffective assistance of counsel and prejudice have been shown and the district court erred.

### B. Mr. Layton's sentence, if not adjusted in line with the McAdam decision, would stand as manifestly unjust and should be overturned as such.

1. Standard of review.

The determination whether a sentence has resulted in manifest injustice must be made on a case-by-case basis under a "shocking to the conscience" consideration; that is, whether the

trial court has abused its discretion by imposing a sentence that is obviously unfair and shocks the conscience of the court. State v. Coleman, 19 Kan.App.2d 412, Syl. ¶ 2, 870 P.2d 695, rev. denied 255 Kan. 1004 (1994).

2. Mr. Layton suffers a manifest injustice if his sentence is not remanded and resentenced in compliance with the McAdam decision.

In discussing what constituted "manifest injustice" in a sentencing case, State v. Cramer, 17 Kan.App.2d 623, 635, 841 P.2d 1111 (1992), this Court said:

> "In a very recent decision, we dealt with a similar question. Although we concluded that the term 'manifest injustice' as used in the statute was not possible of exact definition, we said: 'A sentence which is "obviously unfair" or "shocking to the conscience" accurately and permissibly characterizes one which would result in manifest injustice.' State v. Turley, 17 Kan.App.2d 484, Syl. ¶ 2, 840 P.2d 529 (1992). "In Turley, we concluded that a sentence which 'shocks the conscience of the court' is manifestly unjust. This is similar to saying that, while it is difficult to define 'pornography,' one will most certainly know it when he or she sees it. While this may not be an entirely satisfactory definition, we believe it to be the only definition possible."

In State v. Torrance, 22 Kan.App.2d 721, 730, 922 P.2d 1109 (1996), the determination of whether manifest injustice existed was said to be made on a case-by-case basis under a "shocking to the conscience" that is obviously unfair. In Lloyd v. State, 672 P.2d 152, 155 (Alaska App.1983), manifest injustice was equated to mean something that was obviously unfair. Other states have used slightly different definitions such as "miscarriage of justice" (Clay v. Dormire, 37 S.W.3d 214 [Mo.2000] ); or "injustice that is direct, obvious an observable." State v. Arnold, 81 Wash.App. 379, 914 P.2d 762, rev. denied 130 Wash.2d 1003, 925 P.2d 989 (1996).

In the instant case, if this Court were to find that the ADO did all that it could have done to preserve the issue, Mr. Layton would still suffer a manifest injustice of sentencing because only the fates prevented him from having his case decided against him and for Mr. McAdam.

The McAdam issue was developed based on Mr. Layton's case. The McAdam issue was presented to the Court of Appeals, but the Court chose not to address the issue. The McAdam issue was presented to the Supreme Court in Mr. Layton's case, but they chose not to act upon the issue. Twenty-five days after the mandate was issued in Mr. Layton's case, the McAdam decision was issued.

And because of that twenty-five day difference, Mr. Layton languishes in prison for years more than anyone else that has been sentenced since the McAdam decision and any person whose appeal had been pending on the exact date of the McAdam decision.

That is shocking to the conscience. That is obviously unfair. That is injustice that is direct, obvious an observable. The injustice and the inequity are of a constitutional magnitude and the continuation of Mr. Layton's sentence would constitute cruel and unusual punishment.

Generally, constitutional grounds for reversal asserted for the first time on appeal are not properly before an appellate court for review. State v. Williams, 275 Kan. 284, 288, 64 P.3d 353 (2003). Nevertheless, there are three exceptions to the general rule, including the following: (1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) the judgment of the trial court may be upheld on appeal despite its reliance on the wrong ground or assigned a wrong reason for its decision. State v. Schroeder, 279 Kan. 104, 116, 105 P.3d 1237 (2005).

In the instant case, this argument is a question of law being submitted on proved facts. Moreover, the consideration of this theory is necessary to serve the ends of justice and prevent a denial of fundamental rights.

This Court should find that the dictates of justice require a resentencing for Mr. Layton.

Respectfully submitted,

By:_____

Michael P. Whalen
Sup. Ct. No. 16611
Law Office of Michael P. Whalen
229 E. William, 5th Floor
Wichita, Kansas 67214
Telephone: (316) 265-2598
ATTORNEY FOR PETITIONER/APPELLANT

CERTIFICATE OF SERVICE

This is to certify that five (5) true and correct copies of the above and foregoing Brief was placed in the U.S. Mails, postage prepaid to the following:

Mr. Ty Kaufman
Office of McPherson County Attorney
Bank Building, Ste. 201
P.O. Box 1302
McPherson, Kansas 67460-1302

this ____ of September, 2007.

_____
Michael P. Whalen

**A. The district court erred in its findings of fact and conclusions of law and that the termination of Mother's parental rights was justified.**

1. Standard of review.

When an appellate court reviews a trial court's determination to terminate a parent's rights under the clear and convincing evidence standard, "it should consider whether, after review of all the evidence, viewed in the light most favorable to the State, it is convinced that a rational factfinder could have found it highly probable, *i.e.,* by clear and convincing evidence," that the parent's rights should be terminated. In re B.D.-Y., 286 Kan. 686, 705, 187 P.3d 594 (2008).

2. The findings of the district court must be made based upon clear and convincing evidence.

In Kansas, a parent's right to custody and control of their children is a fundamental right and liberty interest protected by the Fourteenth Amendment to the U.S. Constitution. In re M.M.L., 258 Kan. 254, 264, 900 P2d 813 (1995).

Proof of unfitness must be by clear and convincing evidence. In re M.M., 19 Kan. App. 2d 600, 873 P.2d 1371 (1994). Kansas law makes clear that the term "unfitness" relates to "conduct or condition which renders the parent unable to care properly for a child." In re Bachelor, 211 Kan. 879, 508 P.2d 862 (1973). The substantial evidence must be more than some quantity of negative evidence about a parent but of a quality of evidence that shows clearly and convincingly not merely the existence of negative parental qualities, nor parental eccentricities, but current unfitness and an unlikelihood of sufficient change in the conduct or condition of the parent in the foreseeable future. In re Reed, 8 Kan. App. 2d 602, 635 P.2d 675 (1983).

In In re B.D.-Y., 286 Kan. 686, Syl. ¶ 2, 187 P.3d 594 (2008), the Supreme Court held that the "clear and convincing evidence" standard is an intermediate standard of proof between preponderance of the evidence and proof beyond a reasonable doubt.

Thus, the findings of the district court had to be based upon a higher evidentiary standard than that relied upon in normal, civil proceedings.

3. The district court made numerous erroneous findings of fact.

The district court found that Mother had started working on December 15, 2008 and that she made no arrangements to accommodate her work schedule with her visitation schedule. ( R. I, 77).

This is erroneous for several reasons. First, Mother did have her visit on December 15, 2008. ( R. II, 82). Second, Mother testified that she had spoken to her supervisor and was having her schedule adjusted to fit her visitation and it was her understanding that visits could only occur on Mondays. Id. at 53-54. Third, at the time of the hearing, Mother had only been working for six weeks and she had missed only two visits due to work. And the first visit that

she missed because of work, she had contacted Ms. Stephens and let her know of the conflict. Id. at 82. Further, throughout the time of the unsupervised visits, Mother was consistent in her visitation for nearly eleven months. Id. at 83. It is also a bit presumptuous of the court to expect Mother to approach her new boss and tell him that she can't work on Mondays and could he please change her schedule prior to even beginning work.

In short, mother gained employment, was consistent with her visits and had a stable home. The evidence does not support other findings.

The court found that Mother had friends and family but had not at any time demonstrated a relationship with them such that it would lead the court to believe that it made for stability for the child. Id. at 108.

Again, this is an erroneous finding. Dannon Jones testified that Mother had good relationships with her mother and father. Id. at 16. Ms. Jones also testified that Mother was very connected with her grandparents. "They seemed to provide her with a lot of support, I would say probably both emotionally as well as financially and materialistic." Id. at 16-17. Mother testified that her grandmother would provide daycare and that she actually ran a daycare. Id. at 50. Further, Karen Nevins, Mother's aunt, testified that Mother was a good parent and that Mother was often at her house with KAT and that KAT would play with her cousins and that this occurred pretty regularly. Id. at 93.

So, stable and supportive family available for Mother.

The court found that Mother did not have a place to stay, that she still didn't have a job and that she had not demonstrated the ability to stick to any plan that would enable her to have stability for her daughter. The court found there was no basis to believe that anything was going to change and that being employed for six weeks did not rebut that. Id. at 108.

Error. Mother had a place to stay. First, she was staying with Ms. Rippatoe and had been living there since the placement began a year earlier. Id. at 32-33. Second, Mother stated that she would be willing to begin reintegration at Ms. Rippatoe's and that was where the unsupervised visits had taken place. Id. at 54. Third, Michala Taylor, one of Mother's case workers, testified that she had no concerns with the home that Mother had with Ms. Rippatoe. Id. at 60. Fourth, it was one of Mother's case plan goals to seek independent housing and she had pursued, and received, her Section 8 housing approval. Id. at 70-71.

Thus, there was appropriate housing and Mother had achieved her plan goals in all aspects in regard to this situation, even though she was supposed to have until February to decide on her housing situation. Id. at 71.

Mother had employment. The court made a factual finding that Mother had been employed at WIS International for the past six weeks. Id. at 107. The job paid $7.00 per hour and Mother was working there 48 hours a week. This evidence and testimony was undisputed. Id. at 40; 47. Another mistake by the court, because this consistent work schedule was also a reasonable plan by which Mother could give stability to KAT. Mother already had plans for daycare and transportation to assist with her work schedule.

So, the only goal established that was not met by Mother was getting her GED. Granted, this was significant, especially in light of the fact that it was court ordered both as a part of the CINC case and the juvenile probation.

However, what seems to be flagrantly missing in this case was a psychological evaluation and/or any kind of assessment of Mother's intelligence and learning capabilities. If mothers failure to complete her GED was based on a learning disability or a lack of reading skills or some other treatable disorder, then the court's destruction of a family relationship

would have been shortsighted and criminal.

Further, the court assumed facts not in evidence. The court stated: "in considering what's in the best interest of the child, the court considers that, by all the sociological numbers, that if this situation is left where it is, this child is going to grow up in poverty and without a stable home." Id. 109.

There are, again, a number of things wrong with this statement. First, if being poor was a reasonable and acceptable reason for terminating parental rights, then only the rich could be found to be proper parents. Second, there was no evidence presented of any sociological numbers, whatever that meant, that would show that KAT was doomed to a life of poverty and instability. Making up evidence and phrases as the basis for finding that termination is in the best interest of the child is erroneous, wrong-headed and wrong-hearted. It also means that the court's only finding regarding the best interest of the child was not supported by clear and convincing evidence because there was no such evidence to begin with.

4. The district court erred by not following the treatment recommendation of the only expert who testified.

Mother was required to complete a clinical assessment. Ms. Jones testified that she had six sessions with Mother and that goals and recommendations had been established for Mother in order to effect reintegration of KAT into the home. Ms. Jones first recommendation was that a safety plan for visits would be put into place. Second, Ms. Jones recommended a routine for KAT, which would include meal times, activities and a bedtime routine. Mother was familiar with KAT's likes and dislikes and acted with KAT appropriately. Id. at 7-8. The third recommendation was that Mother complete her GED and gain employment. The final recommendation was that if Mother did not make significant progress by June 2009, that an

alternative plan for permanency be explored and that a guardianship with a healthy adult would be appropriate. Id. at 9-10.

Ms. Jones had met with Mother in the summer of 2008 and had basically given her a year to meet the goals and recommendations in the plan. At the time of the evidentiary hearing, Mother was employed, she was aware of the need for structure and had learned about healthy eating and budgeting. Mother had a home and had taken the steps necessary to have the option of Section 8 housing. Mother had daycare and transportation covered. Mother had furniture for KAT.

And, Mother had been told by the only expert involved in the case that she had until June 2009 to make appropriate changes and only at that time should an alternative plan for permanency be explored.

The court chose to override not only the case plan laid out by the assessing social worker, but ignored her advice and recommendation even in the face of Mother's significant gains in the completion of her plan.

The recommendation of Ms. Jones and the advancements made by Mother directly reject any claim by the court that there was clear and convincing evidence that Mother would not and could not change her circumstances and adjust her life in order to meet the needs of KAT.

The court found that Mother was 20 years old, the case had been going for a year and that the ourt had no basis to believe that anything would change. And that being employed or saying she's employed since December 15th was insufficient to rebut that. And that the "few court orders that we have, there's not an indication that she is implementing any of those." Id. at 108. She did all of her nutrition and parenting classes, she got employed, she has obtained housing and has shown improved parenting skills and has a strong bond and loving relationship

with her daughter. And she was advised by the counselor that she had until June 2009, five more months, in order to make significant changes and that only at that time would a change in permanency be considered.

The court jumped the gun. The court acted impetuously and without consideration of the actions by Mother, the changes she made and the best interest of KAT.

The court did not follow the advice and recommendation of the only expert to testify, Ms. Jones. The court made numerous errors in its findings of fact. The court relied on facts not in evidence. The court gave no credit to Mother for any of the things she achieved and that she got employment in the worst economy in eighty years.

The district court did not make findings based upon clear and convincing evidence and the court's decision to terminate parental rights must be reversed.

Respectfully submitted,

By:_____

Michael P. Whalen
Sup. Ct. No. 16611
Law Office of Michael P. Whalen
6235 W. Kellogg
Wichita, Kansas 67209
Telephone: (316) 265-2598
ATTORNEY FOR NATURAL MOTHER/APPELLANT

CERTIFICATE OF SERVICE

This is to certify that two true and correct copies of the above and foregoing brief were placed in the U.S. Mails, postage prepaid to the following:

Erin Sizemore
SRS Attorney
230 E. William,

P.O. Box 1620
Wichita, KS 67201-1620

Denise Donnelly-Mills
Guardian ad Litem
404 East Central
Wichita, KS 67202

Michael T. Wilson
Attorney for Mother
300 N. Main Street, Ste. 300
Wichita, KS 67202

this day of June, 2009.

_____

Michael P. Whalen

Sup. Ct. No. 16611

_____

Michael P. Whalen