Supreme Court of Kansas.

STATE of Kansas, Appellee,
v.
John Don LAYTON, Appellant.
No. 98,275.
June 26, 2009.

Background: After affirmance of defendant's convictions for unlawful manufacture of methamphetamine, possession of methamphetamine with intent to distribute, possession of drug paraphernalia, and criminal possession of a firearm, 276 Kan. 777, 80 P.3d 65, defendant filed motion to correct an illegal sentence. The District Court, McPherson County, Carl B. Anderson, Jr., J., summarily dismissed the motion. Defendant appealed. The Court of Appeals, 2006 WL 2562813, construed the motion as a habeas motion attacking sentence, and reversed and remanded for evidentiary hearing on the issue of ineffective assistance of direct appellate counsel. On remand, the District Court, Carl B. Anderson, Jr., J., find that direct appellate counsel was not ineffective. Defendant appealed, and the appeal was transferred from the Court of Appeals.

Holding: The Supreme Court held that based on equity and fundamental fairness, Supreme Court would remand for resentencing with respect to defendant's conviction for manufacture of methamphetamine, consonant with the *McAdam* identical offense theory developed based on language in Court of Appeals' initial opinion in defendant's direct appeal.

Remanded to District Court for resentencing.

Appeal from McPherson district court, Carl B. Anderson, Judge.
Michael P. Whalen, Law Office of Michael P. Whalen, of Wichita, argued the cause and was on the brief for appellant.

Ty Kaufman, county attorney, argued the cause, and Paul J. Morrison, attorney general, was with him on the brief for appellee.

MEMORANDUM OPINION

PER CURIAM.

*1 This unusual case considers whether a criminal defendant whose appeal led to a sentencing ruling benefitting many defendants who came after him should receive the benefit as well.

We review the district court's rejection of John Don Layton's motion to correct an illegal sentence, treated appropriately as a motion filed under K.S.A. 60–1507

to challenge ineffective assistance of appellate counsel. Layton, after remand by the Court of Appeals, received an evidentiary hearing on the motion. In that hearing, Randall Hodgkinson of the Appellate Defender's office (ADO) attempted to reconstruct the development and timing of the identical offense theory that led to our sentencing ruling in *State v. McAdam,* 277 Kan. 136, 83 P.3d 161 (2004), the case on which Layton now attempts to rely.

To say that Layton's path to this moment has been long and arduous, even dramatically tortuous, is not hyperbole. The following chronology outlines the pertinent milestones in Layton's case and in other, contemporaneous cases that have some bearing on a just outcome here.

05.01.01 Layton is convicted after jury trial of manufacture of methamphetamine under K.S.A. 65–4159; possession of methamphetamine with intent to distribute under K.S.A. 65–4161; felony possession of drug paraphernalia under K.S.A. 65–4152; and criminal possession of a firearm under K.S.A. 21–4204.

07.17.01 Layton is sentenced. His manufacture of methamphetamine conviction under K.S.A. 65–4159 is treated as a drug severity level I offense.

10.09.01 Layton appeals his sentence out of time to the Court of Appeals.

10.25.01 Layton is granted an out-of-time appeal.

02.04.02 The ADO files an initial Court of Appeals brief on behalf of Paul J. Luttig, Jr. Luttig had been convicted of, among other things, unlawful manufacture of methamphetamine under K.S.A.2001 Supp. 65–4159.

03.01.02 The ADO files an initial Court of Appeals brief on behalf of Layton, arguing that his manufacture of methamphetamine conviction should have been sentenced as a misdemeanor.

05.28.02 The ADO files an initial Court of Appeals brief on behalf of Brian Keith McAdam. McAdam had been convicted of, among other things, conspiracy to manufacture methamphetamine under K.S.A. 65–4159.

08.21.02 The Court of Appeals hears oral argument in Luttig's case.

09.18.02 The Court of Appeals sets oral argument in Layton's case. Layton waives oral argument.

10.04.02 The Court of Appeals files *State v. Luttig,* 30 Kan.App.2d 1125, 1130–32, 54 P.3d 974 (2002), rejecting the argument that defendant's conviction for manufacture of methamphetamine should have been sentenced as a misdemeanor rather than a drug severity level I.

10.15.02 The ADO files an initial Court of Appeals brief on behalf of William L. Ross. Ross had been convicted of, among other things, attempt to manufacture methamphetamine under K.S.A. 65–4159.

10.30.02 The ADO files a petition for review on behalf of Luttig.

*2 12.13.02 The Court of Appeals files its opinion in Layton's case, rejecting the argument that his manufacture of methamphetamine conviction should have been sentenced as a misdemeanor. *State v. Layton,* No. 87,871, unpublished opinion filed December 13, 2002. According to Hodgkinson, language in this opinion prompted ADO lawyers to formulate an argument that manufacture of methamphetamine under K.S.A. 65–4159, a severity level I nonperson felony, should be considered an identical offense to compounding a stimulant under K.S .A. 65–4161, a severity level III nonperson felony. If adopted, this identical offense theory would dictate that a manufacture of methamphetamine conviction be sentenced considerably less harshly.

12.16.02 he ADO files a first Motion for Reconsideration of Layton's case with the Court of Appeals, arguing that Layton's conviction for manufacture of methamphetamine should have been sentenced as a severity level III felony rather than a severity level I felony, but this argument is not based on the identical offense theory. Rather, the ADO criticizes the sentencing judge's reliance on two particular prior convictions to sentence as a severity level I. Hodgkinson would eventually testify at the evidentiary hearing underlying this appeal, apparently relying on memory rather than court records, that the first Motion for Reconsideration filed in Layton's case included an argument based on the newly developed identical offense theory. It did not.

12.17.02 This court denies Luttig's petition for review.

12.24.02 The ADO files a request to file a Supplemental Brief before the Court of Appeals in McAdam's case, citing the Court of Appeals opinion in Layton's case to support the identical offense theory. The request is granted.

12.30.02 The ADO files a Supplemental Brief in McAdam's case, including the identical offense theory.

01.09.03 The ADO files a petition for review in Layton's case, pursuing the earlier argument that the manufacture of methamphetamine conviction should have been sentenced as a misdemeanor but not raising the identical offense theory.

01.16.03 The Court of Appeals hears oral argument in McAdam's case.

01.27.03 The Court of Appeals grants the Motion for Reconsideration in Layton's case, indicating that an amended opinion will follow. No additional oral

argument is set or heard.

02.05.03 The ADO files a Supreme Court Rule 6.09 (2008 Kan. Ct. R. Annot. 47) letter on Layton's behalf in the Court of Appeals, arguing again that the manufacture of methamphetamine conviction should have been sentenced as a misdemeanor.

02.06.03 The ADO files a Reply Brief on behalf of Ross before the Court of Appeals. This brief raises the identical offense theory for the first time in that case.

03.05.03 The ADO files an initial Court of Appeals brief on behalf of Theresa A. Barnes. Barnes had pleaded guilty to, among other things, aiding and abetting the manufacture of methamphetamine under K.S.A. 65–4159.

*3 03.28.03 The Court of Appeals files its amended opinion in Layton's case. *State v. Layton,* 31 Kan.App.2d 350, 65 P.3d 551 (2003). The opinion again rejects the argument that the conviction for manufacture of methamphetamine should have been sentenced as a misdemeanor rather than a felony.

04.03.03 The ADO files a second Motion for Rehearing on behalf of Layton before the Court of Appeals, raising the identical offense theory for the first time in that case.

04.11.03 The Court of Appeals files *State v. McAdam,* 31 Kan.App.2d 436, 66 P.3d 252 (2003), rejecting the identical offense theory.

04.21.03 The Court of Appeals denies Layton's second Motion for Rehearing.

04.22.03 The Court of Appeals hears oral argument in Ross' case.

04.28.03 The ADO files a second petition for review in Layton's case, arguing in the alternative that the manufacture of methamphetamine conviction should have been sentenced as a misdemeanor or that the identical offense theory demanded that it be sentenced as a severity level III rather than a severity level I. The ADO also files a petition for review on behalf of McAdam.

05.07.03 The ADO files an initial Court of Appeals brief on behalf of Aaron E. Laymon. Laymon had been convicted of conspiracy to manufacture methamphetamine under K.S.A. 65–4159. The brief argues that the conspiracy conviction should have been sentenced as a misdemeanor, but it does not raise the identical offense theory.

05.30.03 The Court of Appeals files *State v. Ross,* No. 88,469, unpublished opinion filed May 30, 2003. The opinion is silent on the identical offense theory raised for the first time in the Reply Brief.

06.25.03 The ADO files a petition for review on behalf of Ross.

07.09.03 This court grants the second petition for review in Layton's case, with no limitation on the issues to be addressed. This court also grants the petition for review in McAdam's case.

09.09.03 This court dismisses Layton's first petition for review as moot, given grant of second petition for review.

10.20.03 The ADO files a Supreme Court Rule 6.09 letter on behalf of Layton in this court, providing additional detail on the identical offense theory, which is described as "one of the issues before the court."

10.28.03 This court hears oral argument in Layton's case.

10.31.03 The ADO files another Supreme Court Rule 6.09 letter in Layton's case, following up on an exchange during oral argument concerning whether the identical offense theory had been raised properly before the Court of Appeals.

11.07.03 The Court of Appeals files its summary calendar decision in *State v. Barnes,* No. 89,628, unpublished opinion filed November 7, 2003, affirming its decision in *Luttig.*

12.08.03 The ADO files a petition for review on behalf of Barnes.

12.10.03 This court hears oral argument in McAdam's case.

12.12.03 This court files *State v. Layton,* 276 Kan. 777, 80 P.3d 65 (2003). The decision rejects Layton's argument that his manufacture of methamphetamine conviction should have been sentenced as a misdemeanor and declines to address the identical offense theory, stating that "the order granting review limited the question on review to Layton's sentence for violation of K.S.A. 65–4159." 276 Kan. at 784, 80 P.3d 65. This statement begs the question of whether the petition for review included alternative arguments for why the sentence for manufacture of methamphetamine under K.S.A. 65–4159 was incorrect, which it did. The opinion correctly observes that Supreme Court Rule 8.03(g)(1) states: "If review is not limited, the issues before the Supreme Court include all issues properly before the Court of Appeals that the petition for review or cross-petition allege were decided erroneously by the Court of Appeals." 2008 Kan. Ct. R. Annot. 68. In avoiding the identical offense theory, this court appears to rely on its belief that either the identical offense theory was never properly before the Court of Appeals or that it was never decided by it. The opinion does not deal directly with further language in Supreme Court Rule 8.03(g)(1), which permits this court to consider on petition for review other issues presented to the Court of Appeals and preserved by the parties

for review.

*4 01.05.04 This court issues its mandate in Layton's case and denies Ross' petition for review.

01.06.04 The Court of Appeals issues its mandate in Ross' case.

01.09.04 The Court of Appeals files its summary calendar decision in *State v. Laymon,* No. 89,792, unpublished opinion filed January 9, 2004, rejecting the argument that Laymon's methamphetamine conspiracy conviction should have been sentenced as a misdemeanor.

01.30.04 This court files *State v. McAdam,* 277 Kan. 136, 83 P.3d 161 (2004), accepting the identical offense theory, entitling McAdam to resentencing on his manufacture of methamphetamine conviction as a severity level III rather than a severity level I.

02.04.04 The ADO files a petition for review on behalf of Laymon, raising the identical offense theory.

02.11.04 This court grants the petition for review in Barnes' case. This court rescinds its denial of Ross' petition for review and grants the petition. This court also recalls the Court of Appeals mandate "in order to consider Ross' alternative [identical offense] sentencing argument." This court issues an Order to Show Cause why the *McAdam* decision should not apply to benefit Ross.

03.03.04 Layton files the pro se motion to correct an illegal sentence underlying this appeal. He raises the identical offense theory and cites *McAdam* to support the proposition that his severity level I sentence for manufacture of methamphetamine is illegal under K.S.A. 22–3504.

03.10.04 The Court of Appeals sets defendant Paul A. McCoin's appeal on its summary calendar. (No brief was filed.)

03.16.04 State responds to Order to Show Cause in the *Ross* case.

03.17.04 The ADO replies to the State's response to the Order to Show Cause in the *Ross* case.

03.26.04 The Court of Appeals files *State v. McCoin,* No. 91,039, unpublished opinion filed March 26, 2004, holding *McAdam* did not apply retroactively to cases in which a defendant entered into a favorable plea agreement and failed to raise the sentencing issue on direct appeal.

04.09.04 The ADO files an additional brief on behalf of Ross before this court.

04.23.04 The ADO files a petition for review on behalf of McCoin.

05.12.04 This court hears oral argument in Barnes' case and Ross' case.

06.23.04 This court grants the petition for review in McCoin's case.

06.25.04 This court denies Laymon's petition for review. In addition, this court issues *State v. Ross,* No. 88,469, unpublished opinion filed June 25, 2004, applying *McAdam* because the court characterizes Ross' appeal as pending at the time *McAdam* was decided. The opinion notes that Ross had not raised the identical offense theory in the district court or before filing his Reply Brief before the Court of Appeals. The Court of Appeals had not addressed the identical offense theory in its opinion, concentrating only on the misdemeanor sentencing argument Ross had raised in his initial brief. This court's opinion differentiates Ross' procedural posture from that of Layton by saying that Layton had never presented the identical offense argument before the Court of Appeals "but raised it for the first time in his petition for review." Slip op. at 5. This is not an accurate statement; Layton had raised the identical offense theory in his second Motion for Reconsideration filed in the Court of Appeals. The *Ross* opinion cites Rule 8.03(g)(1) and states that, despite the Court of Appeals' failure to address the identical offense issue, it "was before the Court of Appeals and is therefore properly before this court." Slip op. at 5. This court also issues *State v. Barnes,* 278 Kan. 121, 124, 92 P.3d 578 (2004), which holds that a severity level I sentence for manufacture of methamphetamine is not "illegal" under K.S.A. 22–3504(1), which permits correction of an illegal sentence at any time. Barnes is entitled to the benefit of *McAdam,* despite her guilty plea, because her sentencing appeal was pending when *McAdam* was decided.

*5 07.30.04 The district judge denies Layton's pro se motion to correct an illegal sentence.

10.06.04 Layton appeals from the district court decision on the motion to correct an illegal sentence. The ADO is appointed to represent him on appeal.

10.14.04 The court hears oral argument in McCoin's case.

12.03.04 This court decides *State v. McCoin,* 278 Kan. 465, 468, 101 P.3d 1204 (2004), holding that a motion to correct an illegal sentence does not invest a district court or an appellate court with jurisdiction to consider *McAdam* resentencing for a conviction of attempt to manufacture methamphetamine; "The proper procedure for raising the application of *McAdam* to McCoin's sentence would be by filing a motion pursuant to K.S.A. [ ] 60–1507."

02.17.05 The ADO is permitted to withdraw from Layton's appeal on the motion to correct an illegal sentence.

03.16.05 A lawyer not employed at the ADO is appointed to represent Layton on his appeal on the motion to correct illegal sentence.

06.21.05 The lawyer who replaced the ADO files an initial brief on behalf of Layton.

10.26.05 Layton's appeal on the motion to correct an illegal sentence is set on the Court of Appeals' summary calendar.

11.10.05 This court issues *Laymon v. State,* 280 Kan. 430, 122 P.3d 326 (2005), arising out of a K.S.A. 60–1507 motion filed by Laymon after this court denied his petition for review. We state that our earlier denial of Laymon's petition for review was "attributable to the absence of a Court of Appeals ruling on [Laymon's] late-blooming [identical offense claim under] *McAdam* ..., not to a judgment on its merits. This denial was consistent with our refusal to address the *McAdam* issue raised too late in *Layton.*" 280 Kan. at 439, 122 P.3d 326. We also hold that the ADO lawyer who represented Laymon on direct appeal provided constitutionally deficient representation in failing to push the identical offense argument alongside the argument that the K.S.A. 65–4159 conviction should have been sentenced as a misdemeanor rather than a severity level I felony. Especially given that lawyers practicing at the ADO were involved in both Laymon's case and McAdam's case, "we should charge his direct appeal counsel with knowledge that the *McAdam* [identical offense] issue was worthy of preservation and pursuit." 280 Kan. at 442, 122 P.3d 326. We observe that, at the time the Court of Appeals brief was filed in Laymon's case, the Court of Appeals had rejected both the identical offense theory and the misdemeanor argument; our court had denied a petition for review in a case raising the misdemeanor argument; and the petitions for review in Layton's and McAdam's cases were still pending. By the time the Court of Appeals heard oral argument in Laymon's case, the petitions for review in Layton's and McAdam's cases had been granted by our court, signaling that the identical offense theory still had potential to prevail.

11.11.05 The first lawyer not employed at the ADO who was appointed to represent Layton on the appeal on the motion to correct illegal sentence is permitted to withdraw.

*6 11.14.05 Layton's appeal on motion to correct illegal sentence is removed from a list of cases designated ready for argument before and/or decision by the Court of Appeals.

11.21.05 A second lawyer not employed at the ADO is appointed to represent Layton on the appeal on the motion to correct illegal sentence.

12.05.05 The second lawyer moves to withdraw. A third lawyer not employed at

the ADO is appointed to represent Layton.

01.09.06 The third lawyer files notice with the Court of Appeals that no new brief on behalf of Layton will be filed.

02.01.06 The Court of Appeals resets Layton's appeal on the motion to correct illegal sentence on its summary calendar.

09.01.06 The Court of Appeals decides Layton's appeal on the motion to correct illegal sentence. *State v. Layton,* No. 93,186, unpublished opinion filed September 1, 2006. It remands the motion to the district court for an evidentiary hearing on whether Layton received ineffective assistance from his counsel on direct appeal. Slip op. at 2. The Court of Appeals observes that *McCoin* held appellate courts lack jurisdiction to consider a collateral attack on a sentence under *McAdam* unless it is brought pursuant to K.S.A. 60–1507; it therefore construes his motion to correct an illegal sentence as a K.S.A. 60–1507 motion. Also, Layton is not entitled to automatic application of the sentencing benefit of *McAdam* because the mandate in his case was issued before the Supreme Court's opinion in *McAdam* was filed, meaning Layton's case was not pending on direct appeal per *Barnes.* It cites *Laymon* for the proposition that the ADO may have provided ineffective assistance of counsel on direct appeal if the identical offense theory was not preserved before the Court of Appeals. *State v. Layton,* slip op. at 2.

01.08.07 The district court evidentiary hearing proceeds in Layton's case. Hodgkinson testifies, stating that the lawyers in the ADO first formulated the identical offense theory after the Court of Appeals issued its first Layton decision. He also testifies that the ADO raised the issue in the first Motion for Reconsideration filed in Layton's direct appeal before the Court of Appeals. This statement was incorrect, but Layton's counsel for the evidentiary hearing, Michael Whalen, stated on the record that he had not located a copy of the first Motion for Reconsideration, which would have enabled Hodgkinson to refresh his recollection. In fact, as outlined above, the identical offense theory was not raised in Layton's case until the ADO filed a second Motion for Reconsideration before the Court of Appeals. This was after and not before the Court of Appeals issued its amended opinion. Hodgkinson opined that

"[A]fter the first *Layton* opinion in 2002, I think it was our obligation to preserve [the identical offense theory].... [Anytime] that our office knows about an issue and fails to raise it in a way that—that preserves that issue, ... we're ineffective and I think that's what [the Supreme Court] said in *Laymon.*"

*7 When asked if there was anything the ADO would have done differently in Layton's direct appeal if it had the chance to pursue it over again, Hodgkinson suggested that, in hindsight, Layton's counsel should have tried to file a supplemental brief like that filed in *McAdam* rather than merely a motion for

reconsideration. He acknowledged, however, that, at the time, it was the best judgment of those in the ADO that a motion for reconsideration was the appropriate procedural vehicle to seek the Court of Appeals' consideration of a new issue after issuing an opinion; on the other hand, a supplemental brief was the appropriate procedural vehicle to seek consideration of a new issue before oral argument was held.

02.08.07 The district judge rejects Layton's claim based on ineffective assistance of direct appeal counsel, writing:

"I have come to the conclusion that I cannot find that appellate counsel for [Layton] was ineffective.

"As you will remember, [Hodgkinson] testified at our hearing that the concept or argument that a charge of manufacturing of methamphetamine, a Severity Level I offense, should be sentenced as a Severity Level III offense (now known as the [*McAdam*] rule) did not arise in the Appellate Defender's Office until the Court of Appeals['] original decision came down in this case. Prior to that decision the Appellate Defender's Office raised the ... argument in numerous cases ... to get the Court to rule that manufacturing should be classified as a misdemeanor. *Based upon the rationale and language used by the Court of Appeals in its decision in this case, the Appellate Defender's Office filed a motion for rehearing/reconsideration with the Court of Appeals in which they raised the 'identical elements issue' and argued that it required that [Layton] be resentenced as a Level III offender, i.e. as [McAdam] now requires. As everyone is aware, the Court of Appeals granted the request for reconsideration, however, in their modified decision they for some reason did not rule upon the Level III argument raised by the Appellate Defender's Office.*

"The State correctly points out that the Appellate Defender's Office then appealed the decision of the Court of Appeals to the Supreme Court and raised the [*McAdam*] rule argument in their Petition for Review. In addition, the record on appeal shows that after oral argument before the Supreme Court the Appellate Defender's Office filed a memorandum with the Court wherein it again argued that [Layton] should have been sentenced under KSA 65–4161, a Level III felony offense, and that the failure of the Court of Appeals to address this argument in its modified decision did not prevent the Supreme Court from considering this argument in this appeal. For whatever reason, the Supreme Court disagreed and ultimately refused to consider the [*McAdam*] argument in this case.

"The bottom line is that I simply cannot understand what the Appellate Defender's Office could have done differently in this case. They raised the [*McAdam*] argument before the Court of Appeals once they became aware of it after the original decision had been announced, *but prior to the Court's granting of their request for reconsideration;* they raised the argument in their Petition

for Review of the Court of Appeals['] decision to the Supreme Court; and they raised it again in a memorandum filed with the Supreme Court after oral argument had taken place. The defendant argues that the Appellate Defender's Office was ineffective because it failed to file a motion for reconsideration with the Supreme Court, which the defendant claims would have been pending at the time the [*McAdam*] decision was announced and therefore [Layton] would have been entitled to the benefits of the [*McAdam*] case. I simply do not buy this argument *because the [McAdam] argument had already been raised in front of both the Court of Appeals and the Supreme Court and no relief had been granted.* There was no reason to believe *at that time* that filing a Motion for Reconsideration would produce a different result. At that point, it would have been nothing more than sheer speculation that by filing a motion for reconsideration future relief would have been available based upon some new case [*McAdam*] being announced." (Emphases added.)

*8 03.21.07 Whalen files motion to docket Layton's appeal from the district court's ruling out of time.

04.03.07 The motion to docket out of time is granted and the notice of appeal and docketing statement filed.

09.21.07 After three extensions, Whalen files a brief on behalf of Layton. The brief argues that the ADO provided ineffective assistance of counsel on Layton's direct appeal and that the district judge's holding to the contrary was unsupported by Hodgkinson's uncontroverted testimony that the ADO should have sought supplemental briefing before the Court of Appeals and/or moved for reconsideration after this court's decision. Alternatively, the brief argues for the first time that refusal to resentence Layton under *McAdam* results in manifest injustice, a sentence that is "obviously unfair" and "shocking to the conscience." See *State v. Cramer,* 17 Kan.App.2d 623, 635, 841 P.2d 1111 (1992), *rev. denied* 252 Kan. 1093 (1993) (quoting *State v. Turley,* 17 Kan.App.2d 484, Syl. ¶ 2, 840 P.2d 529 [1992]).

01.22.08 After three extensions, the State files its brief.

02.11.08 Layton's appeal from the district judge's ruling is transferred to this court.

05.12.08 This court hears oral argument in this appeal. Whalen concedes that his manifest injustice argument was not made to the district court. The State concedes this court can examine whether it needs to correct an earlier mistake in Layton's case *sua sponte .*

05.27.09 Whalen files a Motion to Compel the Court to Issue a Decision in the Instant Case.

Legal Standards

Ordinarily, when reviewing the district court's denial of a claim of ineffective assistance of counsel after a full evidentiary hearing, an appellate court must determine whether the district court's factual findings are supported by substantial competent evidence and whether those findings are sufficient to support the district court's conclusions of law. Ultimately, the district court's conclusions of law and its decision to grant or deny a K.S.A. 60–1507 motion are reviewed using a de novo standard. *Bellamy v. State,* 285 Kan. 346, 355, 172 P.3d 10 (2007) (citing *Graham v. State,* 263 Kan. 742, 753, 952 P.2d 1266 [1998]; *Drach v. Bruce,* 281 Kan. 1058, 1063, 136 P.3d 390 [2006]).

To support a claim of ineffective assistance of appellate counsel, it is incumbent upon a defendant to prove that (1) counsel's performance was deficient, and (2) the defendant was prejudiced by counsel's deficient performance to the extent that there is a reasonable probability that, but for counsel's deficient performance, the appeal would have been successful. See *State v. Smith,* 278 Kan. 45, 51–52, 92 P.3d 1096 (2004).

The first prong of the test for ineffective assistance of counsel requires a defendant to show that counsel's representation fell below an objective standard of reasonableness, considering all of the circumstances. Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. The court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Bledsoe v. State,* 283 Kan. 81, 90, 150 P.3d 868 (2007).

*9 Once a defendant has established deficient performance of counsel, he or she also must establish prejudice. Under the prejudice prong of the traditional *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), ineffective assistance of counsel test, the defendant is required to establish prejudice by showing that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. See *Chamberlain v. State,* 236 Kan. 650, 656–57, 694 P.2d 468 (1985).

Counsel's failure to raise an issue on appeal is not, per se, ineffective assistance of counsel. *Laymon,* 280 Kan. at 439, 122 P.3d 326. However, the failure of direct appeal counsel to foresee a change in the law may constitute ineffective assistance if the failure was not objectively reasonable. *Laymon,* 280 Kan. at 439–40, 122 P.3d 326.

Discussion

Although Layton's brief and Whalen's oral argument spent some space, time, and effort arguing that the district judge's factual findings were inconsistent with

Hodgkinson's testimony, this argument is without merit. It is obvious from the district judge's letter explaining his decision that he had perfectly understood Hodgkinson's testimony—the ADO exercised its best judgment when it filed Layton's initial brief on appeal, and the identical offense theory had not yet been developed. When the Court of Appeals' initial decision in Layton's case gave rise to the theory, the ADO attempted to preserve the issue before the Court of Appeals and pursue it before this court. In hindsight, a sixth sense we urge courts to avoid exercising in reviewing ineffective assistance of counsel claims, see *Harris v. State,* 288 Kan. 414, 204 P.3d 557 (2009), Hodgkinson said the ADO might also have filed a request for supplemental briefing before the Court of Appeals or might have filed a motion for reconsideration after this court issued its opinion. The latter had the potential to keep Layton's direct appeal pending long enough for *McAdam* to be filed, but that was not then knowable. Supplemental briefing may or may not have been granted by the Court of Appeals, but there would have been no reason to believe at the time that its promise of success exceeded that of the measures the ADO did undertake. Our careful review of the evidentiary hearing transcript and the district judge's explanation of his findings demonstrates that the findings and the testimony from the sole witness, Hodgkinson, were consistent with one another.

One complicating fact in this case is that neither the findings nor the testimony supporting them were always consistent with reality. Hodgkinson, the district judge, and Whalen repeatedly emphasized that the ADO raised the identical offense theory on behalf of Layton at its first opportunity, *i.e.,* in the first motion for reconsideration filed with the Court of Appeals. Our research has demonstrated this did not happen. The identical offense theory did not emerge in Layton's direct appeal until the second motion for reconsideration, *i.e.,* after the Court of Appeals had issued its modified opinion. Thus it is no surprise that the modified opinion did not mention the theory; the Court of Appeals did not refuse to consider its merits; when it modified its opinion, it had no idea Layton would ever advance it as a reason for a lighter sentence. Any refusal to consider the issue came later and was implicit, flowing from its denial of the second motion for reconsideration.

*10 The foregoing is not to say that either the Court of Appeals or this court has performed flawlessly. This court should have addressed the identical offense theory when Layton's petition for review was granted and the direct appeal outcome examined; the issue had been addressed to the Court of Appeals in the second motion for reconsideration and thus was adequately, if not conventionally, preserved. The petition raised it in the alternative, and our agreement to take the case was not limited in scope to other issues. Later, when Layton's appeal of the district court's denial of his motion to correct an illegal sentence arose, the Court of Appeals could have conducted the same research this court has now conducted on its own initiative, learning what we have learned from records stored by the Appellate Clerk, The same goes for the series of lawyers appointed to represent Layton on the appeal on the motion to correct illegal sentence and for Whalen,

when that appeal led to remand on the ineffective assistance of appellate counsel claim.

Another point bears brief mention. All of the participants in Layton's direct appeal as well as the proceedings that followed were operating in a radically dynamic environment. As the chronology set forth above illustrates, the ADO had many clients whose cases were ripe for application of the new and evolving identical offense theory. Although the ADO is one organism, it has many internal systems and organs, many individual lawyers who do not inevitably move in lock step on their dozens of cases in myriad procedural postures. It was not preferable but it was probably inevitable that some of those clients were slower than others to get a ticket on the *McAdam* gravy train. So too the courts. Our common law method is sometimes painfully narrow and incremental. Although it should ideally get all cases to which a new rule applies on the same page simultaneously, this cannot always happen, for a variety of ponderous and pedestrian reasons.

Having finally established the necessarily undisputed facts in Layton's case history, the next question is whether those facts support a legal conclusion that he received ineffective assistance of counsel on direct appeal. Hodgkinson gave what was in effect expert opinion testimony on this issue, and it appears he did the best he could from memory without Whalen gathering the information for his review that we have now gathered. The unfortunate result was that Hodgkinson's opinion rested on a false factual premise about when the ADO first raised the identical offense theory.

This court can arrive at its own legal conclusion: the ADO did not provide ineffective assistance on Layton's direct appeal. Although it did not raise the identical offense theory at its absolutely first opportunity, it did so early enough under the unusual and constantly shifting circumstances that this court should have addressed it. It provided more than reasonable professional assistance. The ADO also got out of the way as soon as it became evident from our *Laymon* decision that Layton's only path to resentencing was to malign the equality of its performance on direct appeal. We see in the ADO's performance for Layton both competence and diligence. We also see unselfishness.

*11 [1] Do the ADO's virtues paradoxically doom Layton, for whom *McAdam's* application could mean a drastically reduced sentence? Not necessarily. As mentioned above, Whalen also asserted at oral argument that Layton will suffer a manifest injustice if his case is not remanded for resentencing consonant with the identical offense theory. Whalen conceded before us that this argument was not addressed to the district judge. We have previously been willing to consider an issue raised for the first time on appeal, however, if it involves only a question of law on undisputed facts and is finally determinative of the case or if consideration of the issue is necessary to serve the ends of justice or to prevent a denial of fundamental rights. See *Miller v. Bartle,* 283 Kan. 108, 119, 150 P.3d 1282 (2007). In view of the one-of-a-kind fact that Layton's direct appeal gave birth to

the *McAdam* rule that has benefitted so many other criminal defendants, and our verification that our earlier statement distinguishing him from Ross and Laymon was without factual support, we apply the exception to reach the manifest injustice argument.

Manifest injustice is the standard for withdrawal of a guilty or nolo contendere plea after sentencing, see K.S.A. 22–3210(d); *State v. Green,* 283 Kan. 531, 153 P.3d 1216 (2007), and for consideration of an untimely K.S.A. 60–1507 motion, see K.S.A. 60–1507(f)(2); *State v. Mitchell,* 284 Kan. 374, 162 P.3d 18 (2007). Layton's brief is light on support for his argument that this court can set aside any sentence at any time if it perceives a manifest injustice, even in the absence of specific statutory authority. He cites two Court of Appeals cases, but each dealt with statutory language in K.S.A. 21–4618. See *State v. Torrance,* 22 Kan.App.2d 721, 730–31, 922 P.2d 1109 (1996) (defendant's imprisonment under authority of K.S.A. 21–4618 not obviously unfair, conscience-shocking); *State v. Cramer,* 17 Kan.App.2d 623, 636–37, 841 P.2d 1111 (1992) (battered woman convicted of involuntary manslaughter; argument that mandatory imprisonment for crime involving firearm under K.S.A. 21–4618 constitutes manifest injustice rejected under "shocking to conscience standard"); see also *Turley,* 17 Kan.App.2d, 484, 490, 840 P.2d 529, *rev. denied* 252 Kan. 1094 (1992) (same); *Lloyd v. State,* 672 P.2d 152 (Alaska App.1983) (affirming refusal to find manifest injustice under analogous statute permitting deviation from certain presumptive sentences only upon showing of manifest injustice).

[2] This court has acknowledged the Court of Appeals' formulation of the manifest injustice standard under K.S.A. 21–4618 in *State v. Medina,* 256 Kan. 695, 887 P.2d 105 (1994). But we decline to expand the application of the manifest injustice standard to rule in favor of Layton in this case. His sentence, at the time it was imposed, was not illegal; and it does not now shock the conscience, as it was the legislatively authorized penalty for manufacture of methamphetamine. We also note that the legislature has reacted to *McAdam* with statutory amendment to avoid application of the identical offense theory to reduce sentence lengths. See L.2009, ch. 32, sec. 3 (H.B.2236). There also is no specific statutory language invoking a manifest injustice standard to control the unique situation before us.

*12 [3] We elect, instead, to invoke equity and fundamental fairness. See *State v. Gill,* 287 Kan. 289, 294, 196 P.3d 369 (2008). Under the unique circumstances of this case, it is fundamentally unfair that Layton not receive the benefit of the *McAdam* rule. His case was contemporaneous and fundamentally similar to the cases of many who did receive *McAdam* resentencing. Moreover, were it not for the Court of Appeals' choice of language in its first opinion in Layton's direct appeal, the spark of the identical offense theory may never have ignited. Layton is the only criminal defendant who can make such a claim.

We thus hereby vacate Layton's sentence on his manufacture of

methamphetamine conviction and remand this case to district court for Layton's resentencing under *McAdam.*

Whalen's motion to compel is denied as moot.

Remanded to district court for resentencing.