No. _____

IN THE
Supreme Court of the United States

JEREMY BAUM,
Petitioner,
v.

STATE OF MISSOURI,
Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether affirming a criminal conviction on a different theory than what was presented to the jury conflicts with this Court's holdings in *Cole v. Arkansas*, 333 U.S. 196, 202 (1948); *Presnell v. Georgia*, 439 U.S. 14, 16 (1978); *Dunn v. United States*, 442 U.S. 100, 106 (1979); *Chiarella v. United States*, 445 U.S. 222, 236 (1980); *McCormick v. United States*, 500 U.S. 257, 270 n. 8 (1991); and, *Ciminelli v. United States*, 598 U.S. 306, 316-17 (2023), which specifically prohibit a reviewing court from affirming a conviction on a different theory than what was presented to the jury, and thus violates the Due Process Clause of the Fourteenth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jeremy Baum, respectfully petitions for a writ of certiorari to review Point 1 of the judgment of the Missouri Court of Appeals, Western District.

OPINION BELOW

The Missouri Court of Appeals' opinion affirming petitioner's conviction in *State v. Baum*, 711 S.W.3d 498 (Mo. App. W.D. 2025) is included in the Appendix (pp. A-1 – A-48).

JURISDICTION

The opinion of the Missouri Court of Appeals was entered on March 4, 2025, and rehearing was denied on April 1, 2025 (Opinion, p. A-1; Order Denying Rehearing, p. A-152). The Missouri Supreme Court denied Mr. Baum's application for transfer on May 27, 2025, and the Missouri Court of Appeals entered its mandate affirming Mr. Baum's conviction on May 28, 2025 (Order Denying Transfer, pp. A-166 – A-167; Mandate of the Missouri Court of Appeals, p. A-168). This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution in relevant part provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Jeremy was charged by way of an information with one count of sexual trafficking of a child in the second degree (Count I) in violation of Section 566.211 RSMo. (2016), along with several other offenses (Information, p. A-49).

Count I, the count relevant to this petition, alleged that, "Jeremy…committed the felony of sexual trafficking in the second degree…in that on or between May 1, 2017 and May 31, 2020…the defendant knowingly enticed A.S. (D.O.B.: 10/19/02), a child less than eighteen years of age to participate in a sexual performance" (Information, p. A-49).

For purposes of Section 566.211, "sexual performance" is defined in Section 566.200 (15) RSMo. (Cum. Supp. 2011). Section 566.200(15) defines "sexual performance" as:

> [A]ny play, motion picture, still picture, film, videotape, video recording, dance, or exhibition which includes sexual conduct or nudity, performed before an audience of one or more, whether in person or online or through other forms of telecommunication[.]

Jeremy is A.S.'s stepdad, and she used to see him as her dad (TR 321-22; pp. A-51 – A-52). A.S. lived in the same house as Jeremy since she was two years old (TR 323; p. A-53). Beginning at age 15, A.S. would take naps with Jeremy (TR 329; p. A-59). A.S. was living in Florida at the time (TR 329; p. A-59). The naps took place on the couch (TR 329; p. A-59). This happened around five times per month (TR 330; p. A-60). Jeremy would also kiss A.S. longer than she felt

comfortable, and this made her feel confused (TR 330; p. A-60). A.S. and Jeremy would also hold hands (TR 330; p. A-60).

During A.S.'s direct examination, the prosecutor elicited the following testimony from A.S.:

> **PROSECUTOR:** Did this behavior continue when you got to Missouri?
>
> **A.S.:** Yes.
>
> **PROSECUTOR:** Did it change?
>
> **A.S.:** It escalated.
>
> **PROSECUTOR:** And how did it escalate?
>
> **A.S.:** It went from naps and holding kisses longer to I was spending nights in his bedroom and he had me perform mutual masturbation and oral sex and eventually penetrative sex with him.
>
> **PROSECUTOR:** So you used the term mutual masturbation. What do you mean by that?
>
> **A.S.:** I mean I am touching his genitalia and he is touching mine or he is using the vibrator on me.
>
> **PROSECUTOR:** Is he giving you any instructions on how to do that?
>
> **A.S.:** Yes
>
> **PROSECUTOR:** And what was he doing?
>
> **A.S.:** Telling me where to please myself, my position, things like that.
>
> **PROSECUTOR:** Would he tell you how to masturbate him better?

A.S.: Yes

PROSECUTOR: And tell me about that.

A.S.: He would tell me about the movement of my hands was a big thing, just where to - -

PROSECUTOR: Take your time. It is okay.

A.S.: Where to put my hands, how fast to do it, when I needed to add lubrication.

(TR 336-337; pp. A-68 – A-69).

The State submitted the following verdict director for Count I:

INSTRUCTION NO. 8

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or between January 1, 2019, and May 14, 2020, in the State of Missouri, the defendant enticed A.S. (DOB: 10/19/2002) to engage in a sexual performance; by masturbating each other in the same room, and

Second, that defendant did so knowingly, and

Third, that during such times A.S. was less than seventeen years of age,

then you will find the defendant guilty under Count I of sexual trafficking of a child in the second degree under this instruction.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

NON- MAI
Submitted by the State

(Instruction No. 8, p. A-71).

Thus, the basis for the jury convicting Jeremy on Count I was that it believed Jeremy and A.S. masturbating each other constituted a sexual performance. In Point I of his appeal, Jeremy argued that this behavior did not constitute a sexual performance because a sexual performance under Missouri law required that there be an audience and that the audience be separate and distinct from the performance (Original Brief, pp. A-100 – A-103).

The Missouri Court of Appeals, however, affirmed Jeremy's conviction on the grounds that Jeremy watched A.S. masturbate and denied Point I of Jeremy's appeal. *Baum,* 711 S.W.3d at 504. Specifically, the Court of Appeals stated:

> Here, Victim testified that, after they moved to Missouri, she began spending the night in Baum's bedroom, where they engaged in what she called "mutual masturbation," including Baum directing Victim how to position her body and where to please herself, making him both director and audience. The fact that Baum was also a recipient of sexual contact in the same time frame does not eviscerate his role as audience when Victim masturbated in front of him. The evidence that Baum offered Victim suggestions on where to please herself and how to position her body supports a reasonable inference that Baum was observing Victim, just as the defendant in *George* "carefully view[ed] the occurrences" he directed… Therefore, regardless of what

> else was happening at the time, Baum remained an audience of Victim's masturbation.

Id. (Opinion, pp. A-8 – A-9).

As the dissent pointed out, there was no evidence that Jeremy watched A.S. masturbate. *Id.* at 511. (Dissent, p. A-23). More importantly, the dissent correctly stated that even if there was, watching A.S. masturbate was not the theory submitted to the jury and that it violated Jeremy's right to due process to affirm his conviction on Count I on this basis. *Id.* at 511-14. (Dissent, pp. A-23- A-29). The dissent cited many of this Court's cases which specifically have held that it violates a defendant's right to due process to affirm a conviction on a different theory than the one submitted to a jury. *Id.* (Dissent, pp. A-27 – A-29).

In its opinion, the Court of Appeals justified its analysis by noting that Jeremy acknowledged in his brief that a sufficiency analysis was based not on the way the jury was instructed but on the elements of the offense. *Id.* at 505, n. 8. (Opinion, p. A-11). The Court's analysis, however, ignored that Jeremy also argued that his conviction could not be affirmed on a different basis than that submitted to the jury. *See id.* at 513-14. (Dissent, pp. A-28 – A-30). Thus, in Jeremy's case, the sufficiency analysis should be based on whether there was sufficient evidence that Jeremy and A.S. masturbating each other in the same room constituted a sexual performance.

REASONS FOR GRANTING THE WRIT

Jeremy was convicted on the theory that he enticed A.S. into participating in a sexual performance of masturbating each other in the same room; that was the sexual performance presented to the jury. The Court of Appeals affirmed Jeremy's conviction on the basis that there was sufficient evidence that Jeremy watched A.S. masturbate. Thus, the basis for affirming the conviction was different than the basis presented to the jury. This violates Jeremy's right to due process under the Fourteenth Amendment and directly conflicts with numerous cases from this Court. Unlike many cases that come before this Court, the issue in this petition is straightforward and this Court should ensure that its precedent is not ignored.

I. The opinion of the Missouri Court of Appeals directly conflicts with precedent from this Court, which has held that affirming a conviction on a different theory than what was presented to the jury "offends the most basic notions of due process."

For over seventy-five years this Court has held that an appellate court may not affirm a conviction on a basis not presented to the jury. In *Cole v. Arkansas,* 333 U.S. 196, 200 (1948), this Court reversed the conviction of multiple defendants after they were charged with violating Section 2 of Act 193. However, the Arkansas Supreme Court affirmed their convictions as if they had been tried for violating Section 1. *Id.* at 202. In reversing their convictions, this Court stated:

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.

Id.

In *Presnell v. Georgia,* 439, U.S. 14, 15-16 (1978), the Georgia Supreme Court held that a death sentence could not be upheld "upon sodomy as constituting the bodily injury associated with the kidnapping." However, even though the jury was instructed that a sentence of death depended upon the jury finding aggravated sodomy, the Georgia Supreme Court upheld the death sentence because where the jury had not made a finding that the defendant had engaged in forcible rape:

> [E]vidence in the record supported the conclusion that petitioner was guilty of that offense, which in turn established the element of bodily harm necessary to make the kidnaping a sufficiently aggravating circumstance to justify the death sentence.

Id. Citing *Cole,* this Court reversed the death sentence. *Id.* at 17.

In *Dunn v. United States,* 442 U.S. 100, 104, (1979), the defendant was convicted on three counts of making a false declaration. In deciding whether the defendant was guilty, the jury was instructed to consider if a statement the defendant had made in September was inconsistent with his grand jury testimony. *Id.* at 103-04.

The Tenth Circuit affirmed the conviction but did so based on the defendant's statements he made in October. *Id.* at 106. In reversing the convictions, this Court stated, "[t]o uphold a conviction on a charge that was

neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process." *Id.* More notably, this Court stated that "appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Id.* at 107. This Court also quoted the same language from *Cole* stated in this application. *Id.* (quoting *Cole,* 333 U.S. at 200).

In *Chiarella v. United States,* 445 U.S. 222, 225, (1980), the defendant was convicted on several counts of violating the Securities Exchange Act of 1934. The Court reversed the convictions because it held that under the statute, the defendant's actions did not constitute a crime. *Id.* at 231. In its brief to this Court, the Government proposed that the defendant could still be convicted on another theory. *Id.* at 235-36. This Court rejected this argument, stating, "[w]e need not decide whether this theory has merit for it was not submitted to the jury." *Id.* at 236. Citing *Dunn,* this Court later stated that it could not "affirm a criminal conviction on the basis of a theory not presented to the jury[.]" *Id.* at 236.

In *McCormick v. United States,* 500 U.S. 257, 259 (1991), this Court heard a case to "consider whether the Court of Appeals properly affirmed the conviction of petitioner, an elected public official, for extorting property under color of official right in violation of the Hobbs Act[.]" In its analysis, this Court noted that "the Court of Appeals affirmed the conviction on legal and factual grounds that were never submitted to the jury." This Court further stated:

> This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury.

Id. n. 8.

In *Ciminelli v. United States,* 598 U.S. 306, 308-09 (2023), the defendant was convicted of wire fraud under a "right to control theory." "Under the right-to-control theory, a defendant is guilty of wire fraud if he schemes to deprive the victim of potentially valuable economic information necessary to make discretionary economic decisions." *Id.* at 309 (citation and internal quotations omitted). This Court reversed the conviction stating:

> We have held, however, that the federal fraud statutes criminalize only schemes to deprive people of traditional property interests…. Because "potentially valuable economic information" "necessary to make discretionary economic decisions" is not a traditional property interest, we now hold that the right-to-control theory is not a valid basis for liability under § 1343. Accordingly, we reverse the Second Circuit's judgment.

Id.

In its brief, the Government conceded this issue. *Id.* at 316. However, the Government argued that the conviction could be affirmed under a different theory of wire fraud. *Id.* at 316-17. Citing *McCormick and Chiarella,* this Court refused and reversed the convictions. *Id.* at 317. Specifically, this Court stated:

> [T]he Government insists that its concession does not require reversal because we can affirm Ciminelli's convictions on the alternative ground that the evidence was

> sufficient to establish wire fraud under a traditional property-fraud theory. *Id.*, at 31–32. With profuse citations to the records below, the Government asks us to cherry-pick facts presented to a jury charged on the right-to-control theory and apply them to the elements of a *different* wire fraud theory in the first instance. In other words, the Government asks us to assume not only the function of a court of first view, but also of a jury. That is not our role….Accordingly, we decline the Government's request to affirm Ciminelli's convictions on alternative grounds.

Id. at 316-17. (emphasis in original).

These cases show that the principle of an appellate court not affirming a conviction on a different basis than the jury convicted on is a core value of a defendant's right to due process.

Moreover, the opinion of the Court of Appeals is in direct conflict with the fundamental principle that a *jury* determines whether the State has proven beyond a reasonable doubt every fact that is necessary to convict someone. Indeed, this Court has specifically noted that a trial by jury is "the most priceless" safeguard for our liberty. *Irvin v. Dowd,* 366 U.S.717, 721 (1961). In *Jackson v. Virginia,* 443 U.S. 307, 317 (1979), this Court held that the *factfinder* will make the decision as to whether there is sufficient evidence to convict a defendant. [1] In *United States v. Booker,* 543 U.S. 220, 230 (2005), this Court stated:

> It has been settled throughout our history that the Constitution protects every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is

[1] Indeed, *McCormick* also held that the right to a jury trial is violated when an appellate court reaffirms a conviction on a different theory than what was presented to the jury. *See McCormick,* 500 U.S. at 270, n. 8.

> charged." *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). It is equally clear that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States v. Gaudin,* 515 U.S. 506, 511, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). These basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures.

In a concurring opinion in *Estes v. State of Texas,* 381 U.S. 532, 564 (1965), Chief Justice Warren stated:

> [T]he criminal trial under our Constitution has a clearly defined purpose, to provide a fair and reliable determination of guilt, and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated.

Allowing a conviction to be affirmed on a different basis than what was presented to the jury does exactly what the concurring opinion in *Estes* stated could not be tolerated. In light of the Missouri Court of Appeals decision's conspicuous conflict with this Court's opinions on this very issue, Jeremy respectfully requests that the Court grant his petition, summarily reverse the Court of Appeals' opinion for Point I, and rule that Jeremy's conviction must be based on the same theory that was presented to the jury. Alternatively, Jeremy requests that the Court grant the petition and conduct plenary review.

II. This Court can use this case to reaffirm these constitutional principles, for despite the overwhelming precedent from this Court, prosecutors in numerous federal and state jurisdictions continue to argue to have convictions affirmed on a different theory than what was presented to the jury.

This case is a serious candidate for granting summary reversal or, alternatively, plenary review, not only because the opinion of the Missouri Court of Appeals is in direct conflict with this Court's well-established precedent, but also because it gives this Court the opportunity to reaffirm the principle that this Court's precedents cannot be ignored. Indeed, this Court recently granted a Motion for Clarification on its decision in *Department of Homeland Security v. D.V.D.,* 145 S.Ct 2153 (2025), with Justice Kagan criticizing the District Judge for not following this Court's decision to stay its order. *See Department of Homeland Security v. D.V.D.,* 145 S.Ct 2627, 2630 (2025) (Kagan, J. concurring). Justice Kagan's concurrence is especially noteworthy since she voted *against* this Court's decision to deny the previous stay application. Specifically, Justice Kagan stated:

> I voted to deny the Government's previous stay application in this case, and I continue to believe that this Court should not have stayed the District Court's April 18 order enjoining the Government from deporting non-citizens to third countries without notice or a meaningful opportunity to be heard… But a majority of this Court saw things differently, and I do not see how a district court can compel compliance with an order that this Court has stayed…Because continued enforcement of the District Court's May 21, 2025 order would do just that, I vote to grant the Government's motion for clarification.

Id. (internal citations omitted). Justice Kagan's concurrence is important because it stressed the need for precedent to be followed and respected.

Despite the clear precedent that a conviction cannot be affirmed on a different basis than what was presented to the jury, this well-established principle of law continues to be ignored by both state and federal prosecutors.

A. Federal Cases

In *United States v. Abbas,* 100 F.4th 267, 273 (1st Cir. 2024), the defendant was convicted on multiple counts of wire-fraud and money-laundering charges. On three of those counts, the Court of Appeals reversed the defendant's convictions. The Court stated:

> We do so because under the venue provisions of 18 U.S.C. § 1956 (i)(1)(B), the statute as to which the jury was instructed at the request of the government, venue did not lie in Massachusetts. We do not reach the government's alternate argument that venue was proper under 18 U.S.C. § 1956(i)(3), as the jury was not so instructed. Accordingly, we vacate and remand for resentencing and recalculation of the restitution.

Id. at 273-74. In particular, the Court noted that the Government could have presented this theory to the jury, it chose not to. *Id.* at 288. Thus, it could not ask for the defendant's convictions to be affirmed on that theory it chose not to present.

In *United States v. Jean-Baptiste,* 166 F.3d 102, 103 (2nd Cir. 1999), the defendant was convicted of making false statements on a passport application. During trial, erroneous evidence of the defendant using a false social security

number in a prior passport application, was introduced by the Government. *Id.* The Government conceded it was erroneous but argued on appeal that it was harmless since the evidence against the defendant was strong. *Id.* at 103-04.

The basis for the Government's argument was an affidavit. Specifically, the Government argued:

> *Blacker's affidavit establishes that neither* the correct social security number nor the transposed social security number was listed to the defendant.... Given that both numbers are listed to persons other than defendant, ... the jury may have properly inferred that the social security number had not been issued to the defendant.

Id. at 108. (emphasis in original).

The *Jean-Baptiste* Court rejected this argument because this affidavit was not presented until the appeal was pending. *Id.* Thus, the jury never saw it. *Id.* Citing this Court's decisions in *Dunn,* 442 U.S. at 107 and *Chiarella,* 445 U.S. at 236, the Court rejected the Government's argument. *Jean-Baptiste,* 166 F.3d at 108.

In *United States v. Jabateh,* 974 F.3d 281, 286, n. 19 (3rd Cir 2020), the defendant was convicted of immigration fraud and perjury. During the appeal, the Government argued, for the first time, that the defendant's conviction could be upheld under a different statute. The Court, citing this Court's opinion in *Dunn,* 442 U.S. at 106, rejected that argument. *Jabateh,* 974 F.3d at 286, n. 19

In *United States v. May,* 131 F.4th 633, 638 (8th Cir. 2025), the defendant was convicted on multiple counts of mail fraud, wire fraud, receiving kickbacks,

making false statements to the FBI, aggravated identity theft, and falsifying documents to obstruct justice.

On appeal, the Government did not "defend the Patterson aggravated identity theft charged in the superseding indictment and submitted to the jury." *Id.* 645. Instead, the Government argued the conviction could be upheld on a different theory. *Id.* at 645-46. Citing this Court's opinion in *Chiarella,* 445 U.S. at 236, the Court refused to consider the argument. *Id.* at 646.

In *United State v. Duroseau,* 26 F.4th 674, 676 (4th Cir. 2022), the defendant "was convicted of five offenses springing from his plan to take weapons to his native Haiti in an attempt to help the Haitian government quell gang violence overtaking the country." On appeal, the defendant argued there was insufficient evidence to prove Count five. *Id.* Count five alleged that the defendant transported arms to the Haitian army. *Id.* at 682.

On appeal, the Government argued "that [defendant's] conviction can be sustained because the firearms were taken by the national police, whom [defendant] had said he wanted to train." *Id.* (internal quotations omitted). The Court, citing this Court's opinion in *Chiarella,* 445 U.S. at 236, held that the Government could not claim that a conviction be upheld on a different theory that was not presented to the jury. *Id.*

In *United States v. Johnson,* 19 F. 4th 248, 252 (3rd Cir. 2021), the defendant was convicted of making a false statement and identity theft. On appeal, the defendant argued the Government failed to prove his statements were material. *Id.*

The Government responded to this argument by coming up with a new theory as to why the statements of the defendant were material. *Id.* at 261. Citing this Court's opinion in *Chiarella,* 445 U.S. at 236, the Court refused to consider the argument. *Id.*

In *United States v. Yates,* 16 F.4th 256, 261 (9th Cir. 2021), the defendant was convicted of one count of conspiracy to commit bank fraud and twelve counts of making a false entry. At trial, "[t]he accurate-information theory was the cornerstone of the government's case." *Id.* at 264. The indictment alleged that '[o]ne of the purposes of the conspiracy'—and it specified only one—'was to conceal the true financial condition of the Bank and to create a better financial picture of the Bank' for the board and regulators." *Id.* at 264-65. "In pretrial proceedings, the government reiterated that 'the primary purpose of the conspiracy ... was to conceal the information.'" *Id.* at 265. On appeal, however, the Government changed course:

> The government conceded at oral argument that it was no longer 'defend[ing] that accurate information standing alone is a cognizable interest.' Despite its repeated and direct statements before the district court that accurate information in itself constitutes 'something of value,' the government now argues that what it really meant was that the defendants' deception deprived the bank of its property rights in restructuring delinquent loans and pursuing debt collection.

Id. Citing this Court's decision in *McCormick,* 500 U.S. at 270, n. 8, the Court rejected the argument. *Id.*

In *United States v. Robinson,* 83 F. 4th 868, 873, (11th Cir. 2023), the defendant was found to be in contempt for violating an injunction. On appeal, the defendant argued there was insufficient evidence to sustain the contempt conviction. *Id.*

On appeal, the Government argued that the defendant's contempt conviction that she aided and abetted a person in privity with the enjoined parties. *Id.* at 885. The Court noted that the Government did not argue this theory to the district court. *Id.* Then, citing this Court's opinions in *Ciminelli,* 598 U.S. at 316-17, *Chiarella,* 445 U.S. at 236, and *McCormick,* 500 U.S. at 270-71, the Court refused to consider the new arguments and reversed the defendant's convictions. *Id.* at 886.

In *United States v. Barrow,* 109 F.4th 521, 523 (D.C. Cir. 2024), the defendant was convicted of two counts of wire fraud and one count of concealment of material facts. During trial, "[n] one of the evidence, instructions, or arguments focused on whether Barrow's lies deprived the government of the benefit of its employment bargain by denying it of an officer with the desired level of honesty[.]" *Id.* at 529.

On appeal, however, the Government "for the first time assert[ed] that [the defendant's] fraud deprived TIGTA of an honest criminal investigator thereby depriving it of the benefit of the bargain." *Id.* at 528. Citing this Court's decisions in *McCormick,* 500 U.S. at 270, n. 8 and *Ciminelli,* 598 U.S. at 316-17, the *Barrow* Court refused to consider the Government's arguments. *Id.* at 529.

B. State Cases

In *State v. Figueroa,* 457 P.3d 983, 986 (N.M. App. 2019), the defendant was convicted of "two counts of criminal sexual penetration of a minor in the second degree. On appeal, the defendant argued that there was insufficient evidence to support his convictions. *Id.* The Court of Appeals held that the defendant was convicted under an invalid legal theory. *Id* at 988. On appeal, the State argued the defendant's conviction could be upheld on the basis that the child was asleep, the "sleeping victim" theory. *Id.* Citing this Court's decision in *Chiarella,* 445 U.S. at 236, *McCormick,* 500 U.S. at 270, n. 8, and *Cole,* 333 U.S. at 201, the *Figueroa* Court refused to consider this argument. *Id.* at 990-91.

In *State v. Sabato,* 138 A.3d 895, 897 (Conn. 2016), the defendant was convicted of interfering with an officer and witness intimidation. "The defendant's conviction for attempt to interfere with an officer was predicated on a text message that the defendant had sent to a friend instructing him not to cooperate with police officers who were investigating the defendant's involvement in the theft of a cell phone[.]" *Id.* at 897-98.

On appeal, the State tried to argue that the defendant's conviction could be affirmed because the defendant's text constituted a threat to harm the person he texted. *Id* at 902. The State tried to deny that it was arguing its case on a different theory than what it presented to the jury. *Id.* at 903. The Court, citing the record of the trial, rejected that argument. *Id.* at 905. Citing this Court's decision in *Dunn,* 442 U.S. at 106, the Court reversed the defendant's conviction. *Id.* at 905.

In *People v. Pennington,* 400 P.3d 14, 15-16 (Cal. 2017), the defendant was convicted of misdemeanor battery of a peace officer. The issue before the Court was whether a harbor patrol officer was a peace officer under California law. *Id.* at 16. During trial, the State successfully asked the trial court to rule that a harbor patrol officer was a peace officer as a matter of law. *Id.* at 16-17. Additionally, the State never elicited any evidence as to what the harbor patrol officer's primary duty was. *Id.* at 17.

On appeal, the State relied on a new theory that the jury could infer the harbor patrol officer was a peace officer because his most important duty was to enforce the law. *Id* at 24. Citing this Court's decisions in *McCormick,* 500 U.S. at 270, n. 8 and *Chiarella,* 445 U.S. at 236, the Court rejected this new theory. *Id.* It also noted that the State produced no evidence of this at trial. *Id.*

In *McKim v. Cassady,* 457 S.W.3d 831, 833 (Mo. App. W.D. 2015), the defendant sought habeas corpus relief on his murder conviction. The Court of Appeals denied relief while noting that the State argued that relief should be denied because even if the Court believed that the jury would have likely believed the victim died from methamphetamine, there was still evidence that the defendant may have still been involved. *Id.* at 848, n. 29. The Court noted this was a different theory than the theory the State presented at trial. Since the Court did not believe the defendant had met his burden for habeas corpus relief, it did not address the State's argument. It did, however, cite to *McCormick v. United States,* 500 U.S. at 270, where this Court held that a court on appeal could not affirm a

conviction on a legal or factual ground never submitted to the jury. *Cassady,* 457 S.W.3d at 848, n. 29.

In *State v. Dickerson,* 609 S.W.3d 839, 848 (Mo. App. E.D. 2020), the Court of Appeals, also citing *McCormick,* refused to consider the State's argument whether there was sufficient evidence of the crime based on a different theory. Specifically, the Court stated:

> Just as we decline the State's invitation to consider whether the State proved first-degree sodomy based on conduct under a different aspect of the offense than charged or presented at trial, such as incapacity or forcible compulsion, likewise we reject Dickerson's invitation for us to consider any claims of error not raised in his points on appeal.

Id.

The importance of these cases cannot be overstated. Despite clear precedent reaffirming a core due process principle again and again, prosecutors continue to try to have criminal convictions affirmed on different theories than those presented to the jury. If the opinion of the Missouri Court of Appeals is allowed to stand there is no question that prosecutors in Missouri will argue for convictions to be affirmed on different grounds than those presented to the jury. The key difference is that in Missouri, *there will be precedent to support it.*

Again, in light of the Missouri Court of Appeals decision's failure to adhere to this Court's well established opinions on fundamental core due process principles, Jeremy respectfully requests that the Court grant his petition, summarily reverse the Missouri Court of Appeals Opinion for Point I, and rule that Jeremy's conviction must be based on the same theory that was presented to the

jury. Alternatively, Jeremy requests that the Court grant the petition and conduct plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted, and this Court should summarily reverse the Missouri Court of Appeals Opinion for Point I, and rule that Jeremy's conviction must be based on the same theory that was presented to the jury. Alternatively, Jeremy requests that the Court grant the petition and conduct plenary review.

Respectfully submitted,

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