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IN THE SUPREME COURT OF THE UNITED STATES

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REMON LEE, :  
Petitioner :  
v. : No. 00-6933  
MIKE KEMNA, SUPERINTENDENT, :  
CROSSROADS CORRECTIONAL :  
CENTER. :  
- - - - -X

Courtroom 20  
333 Constitution Avenue, N.W.  
Washington, D.C.  
Monday, October 29, 2001

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:04 a.m.

APPEARANCES:

BONNIE I. ROBIN-VERGEER, ESQ., Washington, D.C.; on behalf  
of the Petitioner.  
PAUL C. WILSON, ESQ., Assistant Attorney General,  
Jefferson City, Missouri; on behalf of the  
Respondent.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 00-6933, Remon Lee v. Mike Kemna.

5 Ms. Vergeer.

6 ORAL ARGUMENT OF BONNIE I. ROBIN-VERGEER

7 ON BEHALF OF THE PETITIONER

8 MS. ROBIN-VERGEER: Mr. Chief Justice, and may  
9 it please the Court:

10 Remon Lee is serving a life sentence without  
11 possibility of parole for first degree murder without ever  
12 having had a chance to present testimony from witnesses  
13 who could have established his innocence.

14 I would like to begin by discussing whether  
15 Lee's failure to comply with two Missouri rules governing  
16 motions for continuance is an adequate State law ground to  
17 bar consideration of Lee's Federal due process claim based  
18 on the State trial court's denial of a brief continuance.  
19 In the circumstances in which his motion for a continuance  
20 was made, the answer is no.

21 Under this Court's existing precedents, Missouri  
22 rules 24.09 and 24.10 are not adequate to bar review of  
23 Lee's due process claim because application of the rules  
24 in -- in this case was arbitrary and serves no legitimate  
25 State interest where Lee lacked a reasonable opportunity

1 to comply with the letter of the rules under the  
2 circumstances, where Lee supplied --

3 QUESTION: You're -- you're just summarizing  
4 now, I take it. You're going to go into more detail as to  
5 why --

6 MS. ROBIN-VERGEER: Yes.

7 QUESTION: -- the rules are arbitrary.

8 MS. ROBIN-VERGEER: Correct. I was just  
9 summarizing for the Court the circumstances that made it  
10 so that there was no legitimate State interest served in  
11 this case.

12 QUESTION: Well, at least as far as 24.10's  
13 elements are concerned, presumably those could have been  
14 addressed by counsel. I mean, the -- the different  
15 requirements could have been orally presented. I would  
16 assume that 24.10 sets out certain information that is  
17 generally regarded by the State as -- as crucial --

18 MS. ROBIN-VERGEER: That's --

19 QUESTION: -- in making the decision.

20 MS. ROBIN-VERGEER: That's correct, and every  
21 piece of information required by those rules were before  
22 the trial court. The Missouri --

23 QUESTION: When you say before the trial court,  
24 you mean in the presentation made at that time orally by  
25 counsel? Answer that yes or no, please.

1 MS. ROBIN-VERGEER: No. Every element --

2 QUESTION: Where -- where else are you saying it  
3 came from?

4 MS. ROBIN-VERGEER: The opening statement by  
5 defense counsel.

6 QUESTION: So, the trial judge is supposed to  
7 remember the opening statement by -- by defense counsel  
8 when he passes on a motion for a continuance that's made  
9 at the end of the trial?

10 MS. ROBIN-VERGEER: Let me clarify a few things.  
11 Every element required by the rules was -- was before --  
12 was stated by counsel or by the defendants on the stand --

13 QUESTION: How about -- I didn't find anything  
14 about that at all. The sixth requirement was that the  
15 affiant knows of no other person whose evidence or  
16 attendance he could have procured at trial by whom he  
17 could prove the same facts. Was that addressed? I -- I  
18 didn't find it. Perhaps you could point me to where that  
19 was addressed.

20 MS. ROBIN-VERGEER: The discussion with the  
21 trial court was -- bear in mind the discussion with the  
22 trial court occurred in an emergency situation where  
23 witnesses are suddenly gone and the -- and counsel is now  
24 before the trial court explaining what had happened.  
25 Everyone in the discussion knew who the witnesses were and

1 why they were crucial to his defense. This was a short  
2 trial --

3 QUESTION: You -- you say that the trial judge  
4 knew it too?

5 MS. ROBIN-VERGEER: Yes, and the trial court --  
6 even in the colloquy, you can see that the trial court  
7 knew who the witnesses were. At one --

8 QUESTION: And what their purpose was? I -- I  
9 didn't get that at all out of the transcript.

10 MS. ROBIN-VERGEER: At one point during the  
11 discussion -- the only question that the trial court had  
12 for counsel was were these witnesses under subpoena, and  
13 counsel answered that question yes, twice.

14 QUESTION: The counsel has to make a showing of  
15 his own. It's not just responding to questions from the  
16 court.

17 MS. ROBIN-VERGEER: When the -- when counsel  
18 pulled out the subpoenas and starting reading from the  
19 subpoena and he read, Gladys Edwards is supposed to come  
20 on the last day of trial at 9 o'clock, the trial court  
21 responded, is she the mother, showing that the trial court  
22 understood who the witnesses were. Bear in mind this  
23 was --

24 QUESTION: But what -- what the purpose was.

25 MS. ROBIN-VERGEER: There was only one issue in

1 the case and that was whether the defendant was correctly  
2 identified by the eye witnesses or was he somewhere else.  
3 This was the entire affirmative defense for Mr. Lee.  
4 Three witnesses were his entire affirmative defense,  
5 and --

6 QUESTION: Was that explained in the opening  
7 statement? Could you elaborate on what was said in the  
8 opening statement?

9 MS. ROBIN-VERGEER: Yes. In the opening  
10 statement, which occurred only the day before this  
11 exchange took place, counsel outlined for the trial court  
12 and the jury the fact that Minister James Edwards, Mr.  
13 Lee's stepfather; Gladys Edwards, his mother; and Laura  
14 Lee, his sister had traveled from California to testify  
15 that during the period of July through October 1992, Mr.  
16 Lee had been staying with them in California and was not  
17 in Kansas City. And they -- and his statement provided  
18 certain details that showed why they remembered when it  
19 was, that he had come out for the birthday parties for  
20 himself and for his niece and had stayed through the -- up  
21 to the Halloween party. And all of this was laid out in  
22 the opening statement and made it clear that these  
23 witnesses were crucial to his defense and is what his  
24 entire defense was based on.

25 QUESTION: This -- this goes to the importance

1 of those witnesses. I find it extraordinary that you  
2 didn't get a neighbor or, you know, somebody other than  
3 his mother, his father or stepfather, and the sister to  
4 come and testify he was out there. Nobody else saw him  
5 there? He -- he stayed in their home the whole time? You  
6 know, if I was looking for people to -- to bring to  
7 testify for an alibi -- he was there for how long? For  
8 the whole holiday season?

9 MS. ROBIN-VERGEER: July through October. The  
10 record is silent --

11 QUESTION: Nobody else saw him there that he  
12 could have brought in? He has to bring in his mother, his  
13 stepfather, and his sister?

14 MS. ROBIN-VERGEER: I -- I can't answer that.  
15 The record is silent on who saw him.

16 QUESTION: Well, let me tell you -- let me tell  
17 you, counsel, what -- what concerns me about your case.  
18 Let's -- let's assume that you can convince us that given  
19 the haste -- the press of trial and the shortness of time  
20 that the counsel did about all he could -- all he could  
21 do. But there was a post-conviction new trial motion some  
22 17 days or -- or 2 weeks later, and at that point, the --  
23 the counsel made no specific showing as to why the  
24 witnesses -- the mystery remained. There was -- A, there  
25 was no showing at all or even mentioned of the fact that a



1 court officer might have misled them, and -- and B, we  
2 never know why they left. Whether -- the counsel had 2  
3 weeks to -- to supplement that motion.

4 I -- let me ask you this as a predicate. I  
5 assume that the State trial judge at the new trial motion  
6 had the opportunity and the right under State law to  
7 revisit his ruling denying the continuance.

8 MS. ROBIN-VERGEER: Correct.

9 QUESTION: Well, there was nothing new shown by  
10 counsel at that point. So, even if you -- if we concede  
11 that the press of trial and the surprise that attended the  
12 disappearance of the witnesses excused the counsel from  
13 doing anything more, he surely is not excused from this  
14 skimpy showing 2 weeks later. That's what bothers me  
15 about the case.

16 MS. ROBIN-VERGEER: Okay. As for why, I was not  
17 trial counsel below. I don't know why he didn't say more  
18 in the motion for a new trial. But I can tell you that  
19 the Missouri rules governing motions for a new trial say  
20 that when a -- when error is assigned at the motion for a  
21 new trial stage -- and this is rule 29.11 of the Missouri  
22 Supreme Court rules -- that -- and a request is denied and  
23 then that's made a basis for a motion for a new trial, a  
24 short general statement reiterating that ground is  
25 appropriate in a motion for a new trial.

1           As for why he didn't say more, I can't answer  
2     that.

3           QUESTION: Well, but you're -- you're saying  
4     that Missouri, as a matter of due process, did not afford  
5     adequate opportunity for this attorney to explain the  
6     disappearance of his witnesses. And even if I grant you  
7     that the rush of -- that the press of time was such that  
8     we can excuse the performance at the -- on the day of  
9     trial --

10          MS. ROBIN-VERGEER: I have --

11          QUESTION: -- 2 weeks later he had -- he had all  
12     the opportunity in the world to explain this, I think.  
13     Now, Judge, we were in a hurry when you denied the  
14     continuance. Maybe you didn't understand him, and here's  
15     what happened. He doesn't do that. It seems to me that's  
16     the end of the case from a due process standpoint.

17          MS. ROBIN-VERGEER: I -- I disagree. I think  
18     that the ruling on the motion for a continuance is  
19     evaluated ex ante. It's evaluated at the time that the  
20     motion was denied, and at the time that the motion was  
21     denied -- and the standard has been stated in Unger v.  
22     Sarafite. Quote --

23          QUESTION: But Missouri gave to the attorney the  
24     opportunity to revisit the entire matter at the post-  
25     conviction motion for a new trial, and nothing further was

1 adduced.

2 MS. ROBIN-VERGEER: The motion for a new trial  
3 restated his grounds for granting a new trial, the fact  
4 that the witnesses had come in -- and it did -- it did  
5 explain that they -- these were the alibi witnesses from  
6 California -- so that was clear in the motion for a new  
7 trial -- and the fact that the trial court had denied that  
8 motion without giving him a short recess or without  
9 enforcing the subpoenas. These witnesses were under  
10 subpoenas, and rule 26.03 of the Missouri rules states  
11 that when a witness doesn't -- isn't there for a criminal  
12 trial, he's under subpoena, he's subject to arrest.

13 There's no special procedural rule that governs  
14 how that has to happen. The judge took no effort  
15 whatsoever to enforce the subpoenas in this case, and  
16 we're talking about just a short -- a few hours'  
17 continuance to try to figure out what happened and to get  
18 them in.

19 QUESTION: These were sequestered witnesses, as  
20 I remember it. At the time of the motion for a new trial,  
21 did the lawyer point out that the bailiff, or whoever it  
22 was, had told them they would be excused for the -- till  
23 the next day?

24 MS. ROBIN-VERGEER: That was not stated in the  
25 motion for a new trial.

1                   QUESTION:  It wasn't until later.

2                   MS. ROBIN-VERGEER:  It was in the rule 29.15  
3 State post-conviction motion that that issue first came  
4 up.

5                   But the question of why the witnesses ultimately  
6 left and whether the State was responsible for that is  
7 really a separate issue.  That goes to -- well, that may  
8 go to cause, but it also goes to whether he has a separate  
9 due process claim on that basis.  It's not necessary to  
10 figure out why the witnesses left to evaluate whether or  
11 not the trial court's denial of a brief recess to try to  
12 figure out what happened to the witnesses was an arbitrary  
13 denial --

14                  QUESTION:  Well, there's where I disagree with  
15 you because 2 weeks later, he didn't show anything more  
16 other than they were alibi witnesses.  And I'll -- I'll  
17 assume, for purposes of this question that he knew that  
18 because of the opening argument.

19                  MS. ROBIN-VERGEER:  The reason why they left  
20 doesn't change the fact that the moment that the trial  
21 court ruled on the motion for a continuance, he didn't  
22 know where they were, counsel didn't know where they were,  
23 the prosecutor didn't know where they were.  At that  
24 moment, was it reasonable to deny him -- I mean, the  
25 defendant only asked for 2 hours, just a few hours --

1           QUESTION: Well, but what I'm saying is we don't  
2 need to have at that time because we have the benefit of  
3 hindsight 2 weeks later, and you had nothing new.

4           MS. ROBIN-VERGEER: There's nothing new in the  
5 motion for a new trial, but no new facts need to be  
6 adduced in the motion for a new trial. It is appropriate  
7 in Missouri to bring facts that are outside of the record  
8 in a rule 29.15 post-conviction motion, and they were  
9 brought up in the rule 29.15 post-conviction motion.

10           There's no mystery here about why the State  
11 trial court judge denied the motion, and he denied it on  
12 the merits. He did not deny it because the application  
13 was defective. The prosecutor didn't object to the  
14 application, either the request for a continuance or the  
15 form in which the request was made. Had the trial court  
16 or the prosecutor signaled some question -- and again,  
17 bear in mind the emergency way that this came up -- had  
18 signaled some question, he could have cured it.

19           And in a way, you have a kind of a reverse  
20 sandbagging where error is left embedded in the record and  
21 it isn't until the direct appeal 2 years later that anyone  
22 suggests there was something procedurally defective about  
23 the motion.

24           QUESTION: Do -- do we know that if he had been  
25 given the couple of hours' continuance, which is what he

1 asked for, you would have located the witnesses? Where  
2 did they go? I -- I'm -- that part of the story never  
3 comes out from this stuff. They -- they just disappear  
4 from the courthouse. Is there any explanation of what  
5 happened to them?

6 MS. ROBIN-VERGEER: Well, the affidavits of the  
7 witnesses don't state where they went when they left. In  
8 the rule 29.15 post-conviction motion, it states that they  
9 went to a relative's house. The defendant represented to  
10 the trial court at the time of the colloquy that he knew  
11 they were still in town because there was a religious  
12 event, and counsel provided the actual address of the  
13 relative's house, at which were believed to be staying,  
14 and told the trial court judge that they had no telephone  
15 there, which is why the girlfriend had gone out looking  
16 for them.

17 QUESTION: Where did they go? I mean, had they  
18 gone to a movie? I mean, if they were not back at the  
19 uncle's house, it wouldn't have made any difference unless  
20 it was a very short movie. I mean, the couple of hours'  
21 continuance that he asked for -- we have no reason to  
22 believe it would have been -- it would have been enough,  
23 and that's all he asked for. These witnesses just  
24 disappeared into thin air. We still don't know where they  
25 went.

1 MS. ROBIN-VERGEER: The --

2 QUESTION: Why do you say that, you know, if he  
3 had only gotten these couple of hours, everything would  
4 have been okay?

5 MS. ROBIN-VERGEER: The record doesn't establish  
6 for sure where it is that they went at the time they left  
7 or for a fact that they could have been brought in.

8 Again, I -- I don't think that that's necessary  
9 to the ruling because it's evaluated at the time of the  
10 trial court's denial. But if the Court disagrees, it  
11 could remand this for an evidentiary hearing to engage in  
12 more fact-finding about what the witnesses did.

13 The lower courts never got that far.

14 QUESTION: I think -- I think that's your  
15 burden. I think you have to show that there was an error  
16 that -- that harmed your client, and -- and if the refusal  
17 to -- to give a couple of hours' continuance -- if there's  
18 no reason to believe that -- that it caused any harm,  
19 what's the difference?

20 MS. ROBIN-VERGEER: There is nothing in the  
21 record that contradicts the representations made by  
22 counsel and the defendant to the State trial court that  
23 they were staying at a relative's house and that they were  
24 still in town, and the State has never offered --

25 QUESTION: There's nothing in those facts that

1 suggests you could find them in 2 hours.

2 MS. ROBIN-VERGEER: Well, counsel's actual  
3 request for a continuance was -- was until the following  
4 morning. And if nothing else, even if counsel couldn't  
5 have found them, the State has an obligation --

6 QUESTION: I'm quoting -- I'm quoting from your  
7 brief. Lee asked his counsel to request a couple of  
8 hours' continuance to try to locate them.

9 MS. ROBIN-VERGEER: Correct, and then it's --  
10 and then --

11 QUESTION: Lee told the court that he knew the  
12 witnesses were still in town, blah, blah, blah, blah,  
13 blah.

14 MS. ROBIN-VERGEER: But then -- but ultimately  
15 counsel asked for an overnight continuance. And that's  
16 when the whole exchange with the judge takes place where  
17 the judge says, oh, Friday I'm going to be with my  
18 daughter in the hospital. Then the lawyer says, well,  
19 what about Monday, and the trial judge's response is, I  
20 have another trial scheduled. So, that's where that whole  
21 exchange takes place.

22 QUESTION: So, you -- counsel did ask for a  
23 continuance until the following morning.

24 MS. ROBIN-VERGEER: Correct. Correct.

25 And the sheriff's office could have gone out.



1 Counsel also asked for arrest warrants -- he called them  
2 capiases -- arrest warrants to go out to find the  
3 witnesses, if necessary, if he couldn't have located them.  
4 And that's -- that's the least that the Due Process Clause  
5 and the Compulsory Process Clause would require, would be  
6 some effort to try -- to try to bring in the witnesses --

7 QUESTION: But it's -- it's odd in a way, and  
8 perhaps this doesn't -- that, you know, you would have to  
9 get a capias and arrest your -- your father-in-law and  
10 your mother and your sister.

11 MS. ROBIN-VERGEER: You know, I think that is a  
12 backup suggestion by counsel to cover all bases. They  
13 were under subpoena. The defendant has a right to have  
14 witnesses under subpoena there. They had mysteriously  
15 disappeared. He had no idea why they left or where they  
16 had gone. And he was covering all of his bases by asking  
17 the trial court for arrest warrants, if necessary. It may  
18 never have come to that because the girlfriend wasn't even  
19 given enough time to get to the relative's house to see if  
20 they were there.

21 And just returning also to the circumstances in  
22 which this exchange took place, the trial court had  
23 created a real sense of rush and urgency in this trial.  
24 I've quoted several instances in the opening brief. It's  
25 footnote 9 where the State trial court had indicated to

1 counsel that he wanted to move this case along. Just  
2 before the lunch recess, in fact, he said, I want this  
3 courtroom cleared by 2:00 p.m. And that's trial  
4 transcript page 570. I want this courtroom cleared by  
5 2:00 p.m.

6 QUESTION: Counsel, please -- please don't ask  
7 us to write an opinion where we tell judges it's wrong to  
8 tell counsel to hurry along.

9 MS. ROBIN-VERGEER: No.

10 (Laughter.)

11 MS. ROBIN-VERGEER: No. And I'm not saying that  
12 the -- the trial court doesn't have broad discretion in  
13 how to manage its docket and everything else.

14 But when counsel was before the judge and is  
15 explaining the situation that has occurred, the  
16 atmospherics that had arisen where the trial court judge  
17 is pressuring them to move along factor into how the  
18 colloquy went, especially given that this is an unexpected  
19 situation.

20 It's not that different from what happened in  
21 Osborne v. Ohio, although I think that case is less  
22 compelling than ours because there was no emergency  
23 situation. But in Osborne v. Ohio, Ohio had a rule  
24 requiring that jury -- that objections to jury  
25 instructions be made right before they're delivered.

1 Counsel didn't object to the lack of an instruction on  
2 lewdness, but this Court said that the pretrial motion to  
3 dismiss the indictment on First Amendment grounds was  
4 sufficient and --

5 QUESTION: Well, the rules for reviewing that  
6 sort of thing in this Court have changed a good deal from  
7 the time of Osborne against Ohio I think.

8 MS. ROBIN-VERGEER: Well, the basic principles  
9 regarding when a State law ground is adequate haven't  
10 changed much. This Court takes a functional approach to  
11 looking both to whether or not a litigant has a reasonable  
12 opportunity to preserve his claim and also to whether  
13 anything would be gained whether all of the purposes  
14 served by the rules have been fulfilled, such that there's  
15 some adequate State interest in enforcing a procedural  
16 default.

17 The purpose of these rules is to permit the  
18 trial court to pass on the merits of a motion for a  
19 continuance. The trial court denied this motion on the  
20 merits, and we quarrel with the basis for the trial  
21 court's denial. We think it was as arbitrary as arbitrary  
22 can be. But there's no mystery here as to why the trial  
23 court ultimately denied that request and it wasn't because  
24 of any procedural defect in that motion.

25 QUESTION: But the Missouri Court of Appeals

1 upheld the denial on the basis that it hadn't conformed to  
2 rules what? 09 and 10?

3 MS. ROBIN-VERGEER: Correct. And -- and there's  
4 -- there's something anomalous about an appellate court  
5 coming in to enforce a procedural rule, in circumstances  
6 where there's an emergency situation, such that neither  
7 the trial court, the prosecutor, or the defendant believed  
8 that there was anything more that needed to be done.

9 QUESTION: Well, I -- I think it's fair to say  
10 -- or maybe it isn't. Maybe you can argue with this --  
11 that what the appellate court was saying that at least  
12 under 24.10, there was an insufficient showing, and that's  
13 exactly what the trial judge found. The trial judge  
14 didn't cite 24.10. He doesn't say I'm ruling against you  
15 because you're inadequate of showing under 24.10. But  
16 it's clearly implicit in his ruling.

17 MS. ROBIN-VERGEER: The only thing that could  
18 possibly be missing in the showing that was made during  
19 the exchange on the continuance was a failure to repeat  
20 the full opening statement regarding what the witnesses  
21 would have testified to.

22 QUESTION: No. I think it was assurance that  
23 the witnesses would be provided within -- within the time  
24 frame that -- that they asked for. I didn't see where  
25 that -- that assurance was, and that's what -- what .10

1 requires, and that's what I think the trial judge didn't  
2 -- didn't have, and that's the reason he said, forget  
3 about it.

4 MS. ROBIN-VERGEER: What rule 24 --

5 QUESTION: One of the reasons.

6 MS. ROBIN-VERGEER: -- rule 24.10(b) requires  
7 the name and address --

8 QUESTION: Where are you reading from?

9 MS. ROBIN-VERGEER: I'm reading from page 3a of  
10 the -- the appendix to the opening brief.

11 It requires the name and residence of such  
12 witness, if known -- that was given -- and also facts  
13 showing reasonable grounds for belief that the attendance  
14 or testimony of such witness will be procured within a  
15 reasonable time. The showing that was made to the trial  
16 court during the discussion was both that they were still  
17 in Kansas City, Missouri. They hadn't left for  
18 California, and that they had reason to believe they were  
19 still there because they had a religious event to attend.

20 If he had written out of amotion, he couldn't  
21 possibly have said more. That is a sufficient showing  
22 under that ground.

23 QUESTION: And they had come voluntarily.

24 MS. ROBIN-VERGEER: And --

25 QUESTION: They had not come by subpoena. They

1 weren't subpoenaed until they got to Missouri. They came  
2 there voluntarily?

3 MS. ROBIN-VERGEER: That's correct. They were  
4 subpoenaed in counsel's office when he was interviewing  
5 them.

6 QUESTION: They also skipped voluntarily just  
7 before they were supposed to be put on the stand under  
8 oath.

9 MS. ROBIN-VERGEER: But we don't --

10 QUESTION: Doesn't one factor that into account  
11 as to whether these witnesses who suddenly vanish into  
12 thin air are likely to be found?

13 MS. ROBIN-VERGEER: No, because there was no  
14 factual basis at that moment before the State trial court  
15 judge to have any idea whether it was a medical emergency,  
16 a misunderstanding, they had gone to lunch and hadn't come  
17 back on time. There was no information before the State  
18 trial court at that moment to form any assumption about  
19 why they left.

20 QUESTION: They were there under subpoena. They  
21 knew that they were going to be testifying in an hour, and  
22 they left without apparently telling the person who had  
23 subpoenaed them, their -- their son's counsel, or anybody  
24 else. I mean, are those circumstances which would lead  
25 one to believe that it's going to be a cinch to find these

1 people and bring them back within a reasonable time?

2 QUESTION: But you also have to factor in the  
3 fact they were sequestered witnesses not in contact with  
4 any of these people you're discussing.

5 MS. ROBIN-VERGEER: Correct. They were in a  
6 separate witness room, and during the time that they  
7 supposedly left, there were trial proceedings that were  
8 going on. There was -- they were in trial with witnesses  
9 at the point that they -- that the witnesses left. So,  
10 there wouldn't have been contact.

11 QUESTION: Did their sequestering prevent their  
12 leaving a message with the -- with the clerk of the court  
13 or a marshal or someone saying, tell my son we're going  
14 because we had a medical emergency or, you know -- or  
15 because, as the -- as the later story comes out, some  
16 marshal told us to leave?

17 MS. ROBIN-VERGEER: Well, if you credit the  
18 later story --

19 QUESTION: I find that so implausible that they  
20 should just walk out, not leave any word for -- for their  
21 son for whom they were about to testify. I -- and I don't  
22 think, if I were a trial judge, I would have thought these  
23 witnesses are about to be found within -- within a  
24 reasonable time.

25 MS. ROBIN-VERGEER: You have witnesses who

1       apparently are unsophisticated.  They're not lawyers.  
2       They're not schooled in the law, and if you credit their  
3       story that someone told them their testimony wasn't needed  
4       that day and they could leave --

5                QUESTION:  Wasn't there a thing too that he's a  
6       minister, the father, and he was scheduled to give a  
7       sermon that night?

8                MS. ROBIN-VERGEER:  Correct.  He had -- he was a  
9       minister and he had a religious event in Kansas City that  
10       day and the next, which was the reason that was given for  
11       believing that they were still in town.  No one made any  
12       effort to track these witnesses down or to enforce the  
13       subpoena.

14               QUESTION:  The defendant was in custody, was he  
15       not, during --

16               MS. ROBIN-VERGEER:  Correct?

17               QUESTION:  So, they didn't have actual contact  
18       with him.  They couldn't have gone in and said, hey, we're  
19       going to lunch.

20               MS. ROBIN-VERGEER:  Correct, correct.

21               QUESTION:  There is a --

22               QUESTION:  But they could have told somebody to  
23       tell him, couldn't they?  And -- and there was no reason  
24       to believe at that time -- this story came up a lot later  
25       after the -- much later than 2 weeks that -- that in fact



1 it had been some court personnel who told them that they  
2 were no longer needed. As far as the trial court knew --

3 MS. ROBIN-VERGEER: It actually makes the trial  
4 court's decision that much more arbitrary because at the  
5 moment that the trial court is faced with this question,  
6 you have witnesses who traveled voluntary from California,  
7 who are under subpoena, who actually appeared in the  
8 courthouse, were sitting in a witness room, and had  
9 suddenly disappeared, and no one knew why.

10 QUESTION: Why did it take 17 months to bring  
11 out the -- the information that a court official told  
12 these people their testimony wouldn't be needed? Was it  
13 not needed at all or not needed till tomorrow? That's  
14 unclear.

15 MS. ROBIN-VERGEER: Well, with respect to your  
16 question regarding the delay, I think that's just a  
17 function of how the Missouri post-conviction process  
18 unfolded. He -- you know, he filed a -- a motion for  
19 post-conviction relief later in '94. Counsel was then  
20 appointed. Counsel filed an amended petition, and so you  
21 had the passage of time.

22 QUESTION: Did he get in touch with these people  
23 before -- before 2 weeks -- I mean, before the motion for  
24 reconsideration of -- of the denial of -- of continuance  
25 came up?

1 MS. ROBIN-VERGEER: I don't know whether he got  
2 in touch with them or not.

3 QUESTION: Well, that's extraordinary. I mean,  
4 if they were so easy to find, one -- one would have  
5 thought that he would have contacted them within the 2  
6 weeks and they would have told him within those 2 weeks  
7 that a court personnel had told us to leave.

8 MS. ROBIN-VERGEER: The record --

9 QUESTION: But he doesn't mention that --

10 MS. ROBIN-VERGEER: The record --

11 QUESTION: -- 2 weeks later.

12 MS. ROBIN-VERGEER: The record is silent on  
13 that. I -- I can't answer that.

14 QUESTION: I know it is.

15 QUESTION: Was the motion for a new trial filed  
16 by the same lawyer who represented him during the trial?

17 MS. ROBIN-VERGEER: Yes, it was and in fact, he  
18 was relieved during the sentencing hearing that took  
19 place.

20 QUESTION: I know. He wanted to get out of  
21 there because he wasn't going to get paid even for the  
22 notice of appeal. It seemed to me he was anxious.

23 MS. ROBIN-VERGEER: Correct.

24 QUESTION: And once he had gotten fee for what  
25 had been done, he sort of lost interest in the case.

1           MS. ROBIN-VERGEER: That is an impression that  
2 the record gives.

3           QUESTION: So, you -- you can't say that he --  
4 he got in touch with these witnesses who would have been  
5 so easy to find within a day. You can't even say that he  
6 got in touch with them 2 weeks.

7           MS. ROBIN-VERGEER: I don't know. I don't know.

8           Getting back -- just to return to the second --  
9 to this Court's cases because I think I was beginning to  
10 get into Osborne. I think that Osborne supports our  
11 position here because the Court took a functional approach  
12 in Osborne to whether or not there was any -- anything  
13 that would be gained by forcing counsel to repeat  
14 information that was already before the judge, and the  
15 Court said, no, there was no -- there was no default.

16           Other cases in which this Court has found that  
17 procedural rules were applied with the phrase being  
18 pointless severity or whether there were arid rituals of  
19 meaningless form where technical niceties were not  
20 observed, but nonetheless counsel could substantially  
21 comply with the showings required by the rules, cases like  
22 Douglas v. Alabama where you didn't repeat a futile  
23 objection, cases like Staub v. City of Baxley where  
24 counsel challenged on First Amendment grounds an entire  
25 ordinance and didn't signal out particular -- particular

1 provisions to -- to attack because it was clear what the  
2 -- what the lawyer was challenging. Wright v. Georgia and  
3 NAACP v. Alabama ex rel. Flowers where the claims weren't  
4 grouped exactly right in the -- in the State court appeal,  
5 but this Court, nonetheless, found that no purpose would  
6 be served by finding a default in those cases. All of  
7 those suggest -- and -- and also the fact, of course, that  
8 the defendant did not have a reasonable opportunity to  
9 comply with the letter of the rules, but nonetheless  
10 substantially complied with the rules. All of those  
11 suggest there should be no default, and in the  
12 alternative, even if there was one, that there should be a  
13 finding of cause and prejudice.

14 And with the Court's permission, if there are  
15 any more questions, I'd like to reserve the remainder of  
16 my time.

17 QUESTION: Very well, Ms. Vergeer.

18 Mr. Wilson, we'll hear from you.

19 ORAL ARGUMENT OF PAUL C. WILSON

20 ON BEHALF OF THE RESPONDENT

21 MR. WILSON: Mr. Chief Justice, and may it  
22 please the Court:

23 Justice Kennedy -- Kennedy, you are quite right  
24 to be disturbed by counsel's failure to provide the court  
25 any more information or better showing under -- under rule

1 24.10 in the motion for a new trial that was filed 2 weeks  
2 after the events that the Court has been discussing than  
3 he did.

4 But what should trouble this Court much, much  
5 more than that is that 2 months following the last day of  
6 petitioner's trial, his new trial motion was heard, and  
7 the trial court asked counsel whether he had anything else  
8 that he would like to submit in consideration of the  
9 motion for a new trial, and counsel replied no.

10 QUESTION: Why -- why do you think that might  
11 have been? I mean, why -- why do you think -- I mean, I  
12 was wondering why it wasn't ineffective assistance of  
13 counsel not to put the thing in writing and not to comply  
14 with 10.

15 MR. WILSON: First of all, for -- for counsel to  
16 have represented the facts that 24.10 requires, counsel  
17 would have had to believe that they were true. And one of  
18 the principal purposes --

19 QUESTION: He didn't say all that in the opening  
20 statement, did he?

21 MR. WILSON: Excuse me? I'm --

22 QUESTION: I mean, I wonder why is there no  
23 ineffective counsel claim. Why didn't the Federal court  
24 in this case say, well, look, you're the lawyer in the  
25 State court at the trial, didn't comply with rules 9 and

1 10? My goodness, that was in effective assistance. Why  
2 didn't the habeas court say that here?

3 MR. WILSON: The habeas court addressed the  
4 question of whether there was such --

5 QUESTION: Why didn't they say what I just said?

6 MR. WILSON: And because they -- they said that  
7 claim was never raised to --

8 QUESTION: Now -- now, that's exactly right.

9 Now I want to know why do you think that -- that  
10 that claim wasn't raised at that hearing, namely, the  
11 after-the-trial hearing, the post-conviction?

12 MR. WILSON: First, how trial counsel conducts  
13 trial motions and post-trial motions is an area in which  
14 he -- there is a broad discretion for the trial counsel.

15 QUESTION: Of course, and what I'm really  
16 driving at is, isn't the reason that they didn't raise  
17 rule 9 and rule 10 as showing ineffective assistance at  
18 that post-trial business is because nobody dreamt that the  
19 courts in that State of Missouri would apply rule 9 and  
20 rule 10? Because up to that point, nobody had even  
21 mentioned them. They didn't get mentioned until the  
22 appellate court, after this series of events, on its own  
23 raises rule 9 and rule 10.

24 MR. WILSON: Justice Breyer, that's correct.

25 QUESTION: That's not --

1 MR. WILSON: That is not correct.

2 First, these are published rules of court that  
3 were in the book long before petitioner's trial, and the  
4 cases applying these rules, in fact, comparable to these  
5 and in others, are -- it's an unbroken string of  
6 precedent. So, counsel was either aware of those or was  
7 certainly deemed to be aware of those.

8 QUESTION: Well, at least --

9 MR. WILSON: And second --

10 QUESTION: -- we know that the -- the trial  
11 judge did not deny the continuance on the basis of a  
12 failure to comply with those rules, did he?

13 MR. WILSON: He didn't say because I find  
14 that --

15 QUESTION: There's nothing in the record to  
16 indicate that the trial judge said, well, I can't grant  
17 that. You didn't file it in writing. You didn't supply  
18 this information. That's not in the record, is it?

19 MR. WILSON: No, Your Honor. He did not cite  
20 that.

21 QUESTION: The trial judge denied it because he  
22 wanted to go to the hospital with his daughter on one day  
23 and he had another trial in another case starting the day  
24 after.

25 MR. WILSON: I don't believe that's correct.

1 QUESTION: Isn't that right?

2 MR. WILSON: I don't believe that's correct,  
3 Justice O'Connor. I don't believe that a fair reading of  
4 the record indicates that that is why he denied the  
5 motion.

6 QUESTION: What -- what does it indicate? I  
7 mean, I -- I read it the same way Justice O'Connor did, and  
8 I -- I don't -- what is your reason for --

9 MR. WILSON: I -- I think the record clearly  
10 shows that the reason he denied the continuance is  
11 because, as Justice Scalia suggested, he determined, on  
12 the circumstances that had been presented to him, that  
13 these witnesses abandoned the defense.

14 QUESTION: Then why did he get into his  
15 daughter's hospitalization and his Monday schedule?

16 MR. WILSON: The -- the continuance that was  
17 requested was till the following morning, and it was in  
18 that context -- and -- and it is a single sentence  
19 utterance there, that -- that he noted that he was not  
20 going to be in the courthouse --

21 QUESTION: Well, why if he -- if he was denying  
22 the motion on the ground that there had not been the  
23 specifications that rule 10 required, why get into his  
24 daughter's medical condition?

25 MR. WILSON: The trial judge could have been



1 responding to the idea that even though you've not made a  
2 sufficient showing, I'm not going to cut a break for this  
3 because --

4 QUESTION: Yes, I assume -- I assume there are a  
5 number of factors that go into the judge's decision. One  
6 is that -- the -- the court's own schedule. The other is  
7 the reason these people have gone. He says it looks like  
8 your -- you folks -- I think he said you folks have been  
9 abandoned by these witnesses. And so, he gives a number  
10 of reasons, all of which are exactly what he has to do  
11 under 24.10 even though he doesn't cite 24.10.

12 MR. WILSON: He found that an insufficient  
13 showing had been made, and there are other factors that he  
14 would have been considering.

15 First, counsel had committed to this trial  
16 schedule.

17 Second, defense counsel had announced himself  
18 ready to proceed and had put on part of his case.

19 Third --

20 QUESTION: The witnesses were there, we're told.  
21 They -- they, in fact, were there and subpoenas had  
22 issued. They were there. And it is, I think, somewhat  
23 unusual that in the strange circumstances of their  
24 disappearance, that there wouldn't be some small amount of  
25 time given to find out what had happened.

1           MR. WILSON: Except that the circumstances that  
2 were presented to the trial court, Justice O'Connor, I  
3 believe supported his conclusion that they had left --

4           QUESTION: May I just interrupt? Isn't it  
5 correct that the witnesses were sequestered, and the one  
6 person who would know where they were would be a court  
7 employee who had -- in charge of the sequestered  
8 witnesses?

9           MR. WILSON: There was a court employee in  
10 contact with them and also trial counsel was in contact  
11 with them and the defendant.

12          QUESTION: No. Trial counsel was in court.

13          MR. WILSON: But trial counsel went and checked  
14 on them at 10 o'clock when the State rested its case. He  
15 was back one subsequent time I believe the record shows.  
16 But at least he says in the new trial motion -- he says  
17 with clarity and particularity that he went there at 11  
18 o'clock and they were gone. So, from the time he knew  
19 that they were gone, 2 hours elapsed before they were back  
20 in front of the trial court.

21          And it is important to note that the -- the  
22 colloquy that occurs.

23          QUESTION: Well, they might have gone down to  
24 get an apple out of the vending machine. I mean, the  
25 counsel has got a lot to do. He's got his closing -- his

1 opening statement for the defense. He's got his  
2 witnesses. He goes down. They're not in the room. I  
3 don't -- I don't attribute much to that.

4 MR. WILSON: But if these are the witnesses that  
5 stand between this young man and life in prison without  
6 parole, it is absolutely to be presumed that trial counsel  
7 did what trial counsel would do in that circumstance and  
8 say, you are under subpoena. You don't leave this  
9 courtroom unless I tell you -- you don't leave the  
10 courthouse unless I tell you it is okay. Our case is now  
11 beginning. It will proceed --

12 QUESTION: Why would he have any reason to think  
13 that witnesses who had come on their -- by their own  
14 expense all the way from California and who were in the  
15 courtroom that very morning -- they were there at 8:30, as  
16 I understand, and at 10 o'clock they're still there. Why  
17 would he have any reason to think they would leave?

18 MR. WILSON: Justice Ginsburg, he may not have  
19 believed that they would leave or -- or suspected they  
20 might leave, but these are the sorts of instructions that  
21 trial counsel give their witnesses whether or not they  
22 think that that might happen because the circumstances can  
23 be very dire if they do leave.

24 QUESTION: Well, if -- if we're -- if we're  
25 going to make an argument based on what trial counsel

1 could be expected to do, why isn't it equally fair to make  
2 an argument about what trial judges could be expected to  
3 do?

4           And I would have supposed that if the trial  
5 judge was denying that motion based on rule 9 or rule 10  
6 grounds, he would have said I'm denying your motion  
7 because you haven't conformed with rule 9 to put it in  
8 writing, if that was the case, or rule 10, to specify what  
9 you're supposed to specify. And he didn't do that. And I  
10 am also supposing that if he had done anything like that,  
11 counsel would have said, gosh, judge, please give me a  
12 piece of paper and let me write this out.

13           So, why -- why isn't it a -- a fair inference,  
14 when the judge says nothing about these rules, that the  
15 judge in fact is not relying on those rules in any way?

16           MR. WILSON: First, the judge did ask, following  
17 the discussion about what had happened, whether counsel  
18 intended to file a motion for a continuance. It seems  
19 clear in that that he expected or at least had reason to  
20 believe that counsel would be providing a writing.

21           Second, this trial judge was a very well-  
22 respected court of appeals judge in the State of Missouri,  
23 and in fact he sat on the panel that decided State v.  
24 Settle, which is cited in our brief, which was a case that  
25 determined that a showing -- where the 24.10 showing was

1 not made, either by affidavit, but also by substance, that  
2 the motion -- that the denial of the motion could be  
3 affirmed on that basis alone.

4 QUESTION: Even -- even where it wasn't -- the  
5 denial wasn't based on that basis.

6 Are any of the other Missouri cases involve a  
7 situation where the trial judge did not rely on 9 or 10,  
8 but nonetheless, his action was affirmed on the basis of  
9 -- of failure to comply with 9 or 10?

10 MR. WILSON: I don't know any of the dozens of  
11 Missouri cases that are cited in the briefs that applied  
12 the rule that a failure to comply with those rules will  
13 foreclose appellate review where they cited that the  
14 trial judge had made a specific finding 24.09 has been or  
15 24.10 has been violated. Instead, that's the -- the  
16 review that the appellate court undertook.

17 Second --

18 QUESTION: The question was --

19 QUESTION: -- on that -- I -- I mean, they have  
20 a lot of cases. You know, and in their reply brief they  
21 have -- the other side has some that seem pretty much on  
22 point against you. But there's no case that I can find  
23 directly on point. Direct.

24 MR. WILSON: Justice Breyer --

25 QUESTION: So -- so, if that -- maybe you can

1 suggest one, but I'll go back and read it. But the -- the  
2 rule -- the standard I thought might be useful is the  
3 standard in respect to that, that did the lawyer have fair  
4 notice that the rule exists and applies in the  
5 circumstances.

6 Now, maybe since -- and it was written in an  
7 amicus brief that favors your side -- maybe you approve of  
8 that standard. And I'd like to know, A, do you or not?  
9 And if you do approve of that standard, but I come to the  
10 conclusion here that that trial judge did not have fair  
11 notice that the Missouri rules would apply in these  
12 circumstances where he was suddenly surprised by the loss  
13 of witnesses and nobody in the courtroom said a word about  
14 9 or 10. And nobody said anything about 9 ever, and the  
15 appellate court went and applied it for the first time on  
16 its own.

17 That's a big question, but it has two parts, and  
18 I'd like an answer. The standard and the application of  
19 it.

20 MR. WILSON: The standard that you gave me,  
21 Justice Breyer, I don't believe differs materially from  
22 the standard in Ford v. Georgia which is firmly  
23 established and regularly applied. It's important to note  
24 that regularly applied does not mean precisely applied to  
25 these exact circumstances in a published case prior to the

1 defendant's trial, but rather regularly -- regularly  
2 enforced.

3 And so, I believe that the standard you  
4 articulate is a good one, and this rule meets it because,  
5 A, it's published, and B, there were an -- an unbroken  
6 string of precedents both before defendant's trial and  
7 since that time, and not one of them excuses a default  
8 under 24.09 or 24.10, reaches the merits of a request for  
9 a continuance, and finds that the denial was error.

10 QUESTION: The reason the -- the three aspects  
11 of it that suggest maybe this lawyer did not have fair  
12 notice that the rule would apply in the circumstances are,  
13 first, the lawyer was surprised by his loss of witnesses.  
14 So, he didn't have time to prepare anything in writing in  
15 advance.

16 Second, he's in the courtroom talking to the  
17 judge and he knows full well that everyone in that  
18 courtroom knows every single thing about what rule 9 and  
19 rule 10 require. There was no missing fact. The judge  
20 knew it. The prosecuting attorney knew it, and he knew  
21 it.

22 And third, there is no Missouri case that says  
23 that we're going to require a useless act in the  
24 circumstance where the lawyer has suddenly been surprised  
25 by his loss of witnesses and everything is going on orally

1 in front of the judge anyway.

2 Now, those are the three that I think cut  
3 against you, and so I'd like your reply.

4 MR. WILSON: Surprise, Justice Breyer, was not  
5 present. He went to the witness room at 11 o'clock in the  
6 morning before the lunch break, substantially before the  
7 lunch break, and discovered that they had left. From 11  
8 o'clock then until just after 1 o'clock is the amount of  
9 time he had to conduct his investigation as to where they  
10 had gone, but also to prepare a writing.

11 But leave aside the writing requirement, which  
12 may or may not have operated with any purpose in this  
13 situation -- I believe that it did. But more importantly,  
14 he did not gather the information and present it all at  
15 once to the judge that 24.10 requires.

16 Second --

17 QUESTION: Could you just tell me on that, what  
18 could he have told the judge that he knew that he didn't  
19 tell the judge?

20 MR. WILSON: He did not tell the judge that  
21 these witnesses could be located in a reasonable amount of  
22 time and that they would give the testimony that it has  
23 been suggested they would give.

24 QUESTION: Well, he -- the judge knew what  
25 testimony they were going to give. You don't question



1 that, do you, that there --

2 MR. WILSON: I -- I do question that, Justice  
3 Stevens.

4 QUESTION: Didn't -- didn't the lawyer announce  
5 it in his opening statement to the jury? Isn't that one  
6 reason it was so -- so prejudicial that they didn't show  
7 up?

8 MR. WILSON: The -- the -- a lawyer's statements  
9 and opening statement are not evidence and they're not  
10 evidentiary.

11 QUESTION: But the judge heard the statement.

12 MR. WILSON: He did hear the statement, but  
13 what's --

14 QUESTION: He knew what the witnesses were  
15 intended to testify to, didn't he?

16 MR. WILSON: But 24.10 requires more than that,  
17 Justice Stevens.

18 QUESTION: Well, he did know that much, don't  
19 you agree?

20 MR. WILSON: I do, but -- but it requires  
21 someone to attach their credibility to the proposition  
22 that they will actually give that testimony.

23 QUESTION: And, of course, I suppose the lawyer  
24 knew what the family would testify to before they heard  
25 the strengths of the prosecution's case, which was that

1       there were four witnesses that put him in -- in the city.

2               QUESTION: I don't suppose a lot of judges  
3       concentrate intently on opening statements the way they do  
4       perhaps motions that they have to decide or something like  
5       that. If -- if some -- in the rare instance where  
6       opposing counsel objects to an opening statement, the  
7       judge -- but certainly he doesn't pay attention to that  
8       the way he would to lots of other things in the case.

9               MR. WILSON: Your Honor, that might be true as a  
10       general proposition, but we don't need to rely on a  
11       general proposition in this case because this judge told  
12       these lawyers in this lawsuit the following. Quote: I  
13       don't have a lot of faith in what's said in opening  
14       statements anyway. That's the trial --

15              QUESTION: Are you going to tell me right now --  
16       we both read this record. And are you going to tell me  
17       that in your opinion, the judge did not know that these  
18       witnesses were here to say that the defendant was in  
19       California at the time?

20              MR. WILSON: The judge knew that he did not have  
21       anybody in that courtroom who was willing to stand up and  
22       say on my credibility, that's what these witnesses --

23              QUESTION: He did not know that he had the  
24       lawyer's assurance of that. He did not know that he had  
25       the lawyer's assurance of that.

1 MR. WILSON: Or any other --

2 QUESTION: Because in fact he did not have the  
3 lawyer's assurance.

4 MR. WILSON: That's correct.

5 QUESTION: But he did --

6 QUESTION: Actually I asked the question that  
7 I'd like an answer to. The question that I asked you was  
8 whether you're prepared to say right now that the judge  
9 did not know that the purpose of these witnesses was to  
10 testify that the defendant was in California at the time.  
11 I didn't ask you the question that Justice Scalia asked.  
12 I asked you my question. I'd like to know the answer to  
13 my question.

14 MR. WILSON: I believe that the -- that the  
15 judge knew what had been said -- what had been attributed  
16 to them in the opening statement. I -- that is not the  
17 test that 24.10 requires. That's not the --

18 QUESTION: That's a different -- well, if you're  
19 -- you're willing to say, which I think is fair and I  
20 think correct, that on the basis of this record, the judge  
21 knew that the point of these witnesses was to testify that  
22 the defendant was in California at the time.

23 MR. WILSON: At the most --

24 QUESTION: The answer to my question is yes. Is  
25 that right?

1           MR. WILSON: Yes. At the most what he knew was  
2 counsel expected that to be their testimony the day of --

3           QUESTION: Well, he knew something more than  
4 that, didn't he? He knew that counsel, who was an officer  
5 of the court and need not be sworn in making  
6 representations in that courtroom, had represented as a  
7 matter of fact to the judge and to the jury that that's  
8 what the witnesses would testify.

9           MR. WILSON: No, I don't believe that that's  
10 correct. I don't believe that that's what you can say his  
11 statement and opening statement means. I think that it  
12 means that standing there -- at -- at the most, what you  
13 could say is, standing there in front of the jury -- and  
14 he's addressing the jury and not the judge -- that his  
15 best expectation of the best the evidence will be out of  
16 the witnesses' mouths is as he stated it. I don't --

17          QUESTION: What -- I presume what he stated was  
18 not if things go as well for me as possible, these people  
19 will say as follows. I presume what he said is, I have  
20 these three witnesses. He described their relationship,  
21 their location, et cetera. And they will testify that the  
22 defendant was in California at the time. I presume that's  
23 what he represented in open court. Isn't that correct?

24          MR. WILSON: That is what he told the jury.

25          QUESTION: -- because we have the transcript

1 that shows exactly that. He told the jury these are the  
2 three witnesses. They will testify that he was in  
3 California. He described the witnesses and he said, they  
4 will testify.

5 MR. WILSON: Yes.

6 QUESTION: He didn't say, the best thing that  
7 you might infer from what they testify.

8 MR. WILSON: But counsel's statements to the  
9 jury in opening statement are not held to the level of a  
10 representation of an officer of the court to the judge --

11 QUESTION: But the judge was fully apprised that  
12 the defendant was expecting to put on witnesses and that  
13 they were alibi witnesses. There's no doubt about that,  
14 is there?

15 MR. WILSON: The judge knew facts -- knew those  
16 facts from the opening statement only.

17 But 24.10 requires someone to attach their  
18 credibility to those propositions when they are asserted  
19 as the basis for an interruption in the orderly conduct of  
20 a criminal trial.

21 QUESTION: Is it your experience that witnesses  
22 ever have second thoughts about giving their story after  
23 they've heard the strength of the prosecution's case?

24 MR. WILSON: That -- Your Honor, I believe that  
25 that does happen. And I believe especially it can happen

1 in a case such as this one where the defense counsel did  
2 not know the strength of the State's case as accurately as  
3 he might have because instead of the --

4 QUESTION: But were these witnesses in the  
5 courtroom to hear that testimony? I thought they had been  
6 sequestered.

7 MR. WILSON: They had been sequestered. That's  
8 correct.

9 QUESTION: So how would they know? How would  
10 they know the strength of the government's case if they  
11 hadn't been there to hear it?

12 MR. WILSON: I don't know that they did know,  
13 but I know that they visited frequently with the defendant  
14 and with defendant's counsel. I don't know that they did  
15 know.

16 And -- and it isn't for us 9 years later --

17 QUESTION: They did later file affidavits  
18 substantiating what the -- was said in the opening  
19 statement, didn't they?

20 MR. WILSON: Excuse me?

21 QUESTION: They did later file affidavits  
22 consistent with what the counsel had said in his opening  
23 statement.

24 MR. WILSON: Yes, 4 years later they did, 4  
25 years --

1           QUESTION:  What about the third part which is --  
2   I -- I take it as well that you would agree that the judge  
3   heard that this -- the missing witness is a minister who's  
4   there for a religious event that's taking place that  
5   evening.  All right.

6           So, we know that 9 and 10 were not literally  
7   complied with.  Now, but they might have been  
8   substantially complied with.  And so, at this point, when  
9   everybody knows in the room what's going on, was the  
10  lawyer fairly apprised that what we had to do was perform  
11  what he might have thought of as a useless act?

12           And the case that's the strongest for your yes  
13  answer, he had to go through the form even though the  
14  substance was right there in the case of the surprise  
15  witnesses -- your strongest case or two under Missouri law  
16  is?

17           MR. WILSON:  Missouri v. Cuckovich and other  
18  cases cited in the -- in the dissent in the Eighth Circuit  
19  where he quite candidly categorizes and admits that  
20  Missouri rules of 24.09 and 24.10 applied prior to trial,  
21  at the outset of trial, and during trial.  They apply --  
22  they apply --

23           QUESTION:  Well, you don't want us to decide  
24  this case on the fact that he didn't make an affidavit, do  
25  you?  I mean, that's so easy.  The judge puts him under

1 oath or gives him 2 minutes to write something out.

2 You're not resting on that, are you?

3 MR. WILSON: Your Honor, I am not --

4 QUESTION: -- 24.10 I would --I would think.

5 MR. WILSON: I'm not going to stand on the  
6 formality, and we didn't stand in the court of appeals on  
7 a formality of a writing or even the formality of an  
8 affidavit.

9 But there was no one in the courtroom at the  
10 time this issue was being decided who was willing to  
11 attach their credibility to these assertions, who was  
12 willing to say to the judge, if you stop this trial, I  
13 believe there is a reasonable probability that I can  
14 produce these witnesses and that they will give this  
15 defendant an alibi, that they will say on the date and  
16 time of this murder, he was not within 1,000 miles.

17 QUESTION: So, if I read through the transcript  
18 and I came to the conclusion that everyone in that  
19 courtroom in that very short trial, in the circumstances  
20 given what was said, would have very clear that this  
21 lawyer does mean to tell the judge, one, these are my own  
22 witnesses that make a difference. Two, they're alibi  
23 witnesses. Three, they're going to say he's in  
24 California. Four, I don't know why they left. Five, give  
25 me a couple of hours or at least till tomorrow morning.



1 He's giving a sermon downtown and I'd like to try to find  
2 him. Now, if I come to the conclusion that any one  
3 reasonable person in that courtroom would have thought  
4 that was -- the lawyer was saying that in the  
5 circumstances, I could hold against you. Is that right?  
6 If I think that the circumstances were such in the  
7 courtroom that anyone would have -- any reasonable person  
8 would have come to the conclusion that this was in effect  
9 what the lawyer was telling the judge.

10 MR. WILSON: In effect, what the lawyer was  
11 telling the judge by reference, implied or otherwise, to  
12 the entire body of trial is not what 24.09 or 24.10  
13 require. They require that that showing be made in the  
14 application for the continuance.

15 Now, if we say that an oral application is fine,  
16 okay, but you still have to present the facts and you have  
17 to present them in a way that makes them believable  
18 because what's being asked for is a serious imposition on  
19 the trial court and its conduct of this criminal trial.

20 QUESTION: Mr. Wilson, at the time of the new  
21 trial motion, the transcript was available to the judge of  
22 the proceedings?

23 MR. WILSON: I don't know, Justice Ginsburg.  
24 The new trial motion was filed 2 weeks after trial, but  
25 the new trial motion was heard 2 months after trial.

1           QUESTION: My concern with your position is you  
2 suggest twice in your brief that counsel ought to have  
3 scribbled out this 24.09 notice. He could have had a  
4 legal pad and scribbled it out. That seems inconsistent  
5 with your answer that you're not seeking to the form.

6           Here is -- is a man on trial for a very serious  
7 offense. The lawyer is faced with the absence of the only  
8 witnesses he has. He's got to do his best. Should he be  
9 thinking about scribbling anything on a piece of paper?  
10 Should he be -- have all of his attention trained on how  
11 can he do the best for his client under these extremely  
12 horrible circumstances?

13           MR. WILSON: Justice Ginsburg, that argument in  
14 the brief is -- is not made to show what a reasonable  
15 lawyer would do or what every lawyer could do, but rather  
16 to show that it was neither impossible nor impractical --  
17 impracticable to comply with the rule.

18           QUESTION: Well, I -- I -- 29.09. I was  
19 surprised to see the Missouri Court of Appeals interpret  
20 it to apply to things like a motion for a continuance  
21 arising during trial because it -- well, it's very  
22 difficult, I would think, for a lawyer, suddenly faced  
23 with an emergency like this, to -- you know, you obviously  
24 -- you can't go back to your office and dictate a motion,  
25 and to simply write out something in longhand when perhaps

1 he can simply make the statement orally.

2 MR. WILSON: It may be surprising that -- that  
3 the court of appeals and the Missouri Supreme Court have  
4 done that, but they have done it. And that is the  
5 Missouri law and -- and it has been so for some time. And  
6 the mere fact --

7 QUESTION: We don't know -- we don't know that  
8 -- that the idea of you have to scribble something in the  
9 court has been around for some time because, as you said,  
10 there's no case that presents precisely that situation  
11 where the motion is in the -- in the heat trial something  
12 unexpected happens. You have no precedent that says, even  
13 so, under the Missouri rules you must sit there in your  
14 seat at counsel table and scribble out a motion.

15 MR. WILSON: Well, the -- no. The -- the  
16 precise circumstances of this petitioner's case have not  
17 arisen in a published case in Missouri. That's correct.

18 But there is -- it was clear that in the midst  
19 trial and even in some exigency, the courts of appeals and  
20 the Missouri Supreme Court had held 24.09 and 24.10 to  
21 require a writing and a sufficient showing in the past.  
22 And -- so, if this counsel -- as soon as this colloquy was  
23 concluded and the motion had been denied, they turned  
24 immediately to the -- to the petitioner's counsel's motion  
25 for judgment of acquittal at the close of all of the

1 evidence. He made that motion orally, but because he knew  
2 that in order to preserve his right to appeal any of the  
3 points therein, he asked the judge, and the judge gave him  
4 permission, to file the writing later.

5 The same is true with this rule. Because  
6 anybody who had read the cases applying 24.09 and 24.10  
7 would know that you are forfeiting your right to appellate  
8 review of a denial if you have not put the sufficient  
9 showing before the judge and done so in writing.

10 QUESTION: Mr. Wilson, I thought you weren't  
11 going to rely very much on the -- on the not written part,  
12 but let's talk about the other part, that all of these --  
13 even if all of these factors of substance that had to be  
14 in the motion were somewhere in the trial transcript and  
15 even if you could say that this trial judge knew it, you  
16 couldn't say, could you, that the court of appeals knew  
17 it, that the court of appeals could look back to this  
18 motion without searching the entire transcript and asking  
19 itself, I wonder what, under this transcript, the trial  
20 judge knew? The -- the court of appeals in Missouri could  
21 not look at the motion and say, well, he set forth what he  
22 had to say -- set forth. That -- that's clear, isn't it?

23 MR. WILSON: Yes, that is clear.

24 QUESTION: The court of appeals would have been  
25 constrained to review the entire trial record, which it is

1 one of the purposes of -- of .10 to avoid.

2 MR. WILSON: Yes, it is. 24.10 -- one of the --

3 QUESTION: It is not purposeless, even if you  
4 assume that the trial judge knew that -- that in fact the  
5 lawyer was -- was making the affidavit that he -- that he  
6 had to make.

7 MR. WILSON: Yes. The purpose would be to  
8 provide a meaningful appellate review by bounding the  
9 relevant facts in a credible fashion and presenting them  
10 not just to the trial judge, but also to the court of  
11 appeals.

12 QUESTION: But, of course, I suppose the court  
13 of appeals is entitled to rely upon the trial judge's  
14 reasons when it reviews the adequacy of those reasons for  
15 granting the motion. So, if the trial judge's reasons do  
16 not look -- do not reasonably refer to rule 10, then I  
17 suppose on anybody's theory, the court of appeals wouldn't  
18 have to search the record. Isn't that so?

19 MR. WILSON: No, I don't believe so because the  
20 -- the very purpose of the appellate rule is that they  
21 will not do exactly that. If 24.09 and 24.10 were not  
22 complied with, then it doesn't really matter.

23 QUESTION: No. All I'm -- all I'm saying is  
24 that I thought what the -- the State court of appeals  
25 would review would be the -- the reasons given by the

1 trial judge for ruling as he did. Isn't that correct?

2 MR. WILSON: No, I don't believe so. I believe  
3 -- I believe that what is appealed from is the decision  
4 and not the reasons for the decision.

5 QUESTION: Mr. Wilson, in -- in answer to  
6 Justice Scalia's question about hunting through the whole  
7 record, wouldn't counsel, notified about the 24.10  
8 requirement, say, judges, you don't have to read through  
9 the whole record? I'm putting it all in front of you, the  
10 exact words. It will maybe be two or three pages, but not  
11 a whole record. Shouldn't the attorney be able to, in  
12 this very case, in a matter of a few pages say where --  
13 where it was in the transcript?

14 MR. WILSON: Except that compliance with 24.10  
15 doesn't -- doesn't require you to be able to trace it  
16 through the record, but rather that you presented it all  
17 at once to the trial judge and that you did so with some  
18 credible reason to believe that what was being asserted  
19 was so.

20 Your Honors, 2 -- 2 months after this -- after  
21 the denial of the continuance occurred, they appeared  
22 before this very same trial judge to hear the motion for a  
23 new trial. No explanation was given to that judge. No  
24 better or further showing was provided. Even the simplest  
25 fact like the -- like that they were available and able to

1 testify the very next day in Kansas City was not offered  
2 to this trial judge. There was no due process claim  
3 before this trial judge either at trial or on the motion  
4 for new trial, and he had no facts to believe that he had  
5 done anything other than what was fundamentally fair under  
6 that circumstance on the circumstances as they had been  
7 presented to him in the context of the motion for a  
8 continuance.

9 Thank you.

10 QUESTION: Thank you, Mr. Wilson.

11 Ms. Vergeer, you have 3 minutes remaining.

12 REBUTTAL ARGUMENT OF BONNIE I. ROBIN-VERGEER

13 ON BEHALF OF THE PETITIONER

14 MS. VERGEER: Just a few quick points. With  
15 respect to the proffer and somebody being willing to put  
16 their credibility on the line, the defendant actually took  
17 the stand during the -- the colloquy on the continuance.  
18 He was sworn, which actually you would think is a superior  
19 form of proof to an affidavit, and there he was subject to  
20 cross-examination by the prosecutor, if there had been any  
21 questions. She didn't have any other than to clarify that  
22 the witnesses had been under subpoena, which they had  
23 been. And -- and so, I -- I think that the -- that whole  
24 like of inquiry about whether somebody is willing to sort  
25 of swear to facts in support of the motion sort of falls

1 by the wayside because he was on the stand.

2 In addition, in terms of what -- what all the  
3 players in the sea knew about -- about these witnesses,  
4 there's a rule. It's rule 25.05 of the Missouri rules  
5 that requires a notice of an alibi to be given.  
6 Apparently one was given because the prosecutor came  
7 prepared in her opening statement to address briefly the  
8 fact that there was an alibi defense that she expected to  
9 be presented.

10 And in addition, the detectives interviewed  
11 these witnesses while they were in Kansas City and took  
12 statements from them, and if there was any question later,  
13 as the record developed further in Federal court, about  
14 whether these witnesses really would have said what --  
15 what they said they were going to say, the State had  
16 whatever notes or statements that was taken from the  
17 interviews that were done with these witnesses.

18 QUESTION: Ms. Robin-Vergeer, was any due  
19 process argument ever raised at the motion for a new trial  
20 level?

21 MS. VERGEER: At the motion for a new trial, the  
22 defendant argued the denial of the brief continuance and  
23 the denial of the arrest warrant to enforce the subpoenas  
24 -- argued that that denied the defendant a fair trial.  
25 Due Process Clause was specifically mentioned in the post-



1 conviction motion and on appeal in the Missouri Court of  
2 Appeals.

3 QUESTION: Well, in the post-conviction  
4 proceeding, as I recall, what was raised was ineffective  
5 assistance of counsel primarily.

6 MS. VERGEER: Actually, it -- it was both. In  
7 the amended post-conviction motion and -- and the relevant  
8 passage is on page 56 of the joint appendix and it  
9 continues through page 58 -- the defendant specifically  
10 argued that movant was denied his rights to due process of  
11 law and to the effective assistance of counsel guaranteed  
12 by the Sixth and Fourteenth Amendments when -- and then it  
13 sort of recites, and it -- and it goes along and says --  
14 and talks about, A, the fact that someone told the  
15 witnesses to leave and, B, that the trial court overruled  
16 the -- the defense motion for a continuance. So -- so,  
17 the Due Process Clause is -- is explicitly stated there  
18 and -- and thereafter.

19 If there are no further questions.

20 CHIEF JUSTICE REHNQUIST: Thank you, Ms.  
21 Vergeer.

22 The case is submitted.

23 (Whereupon, at 12:04 p.m., the case in the  
24 above-entitled matter was submitted.)

25