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. :

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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.

C O N T E N T S

P R O C E E D I N G S

(11:04 a.m.)

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

Ms. Vergeer.

ORAL ARGUMENT OF BONNIE I. ROBIN-VERGEER

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

MS. ROBIN-VERGEER: Yes.

QUESTION: -- the rules are arbitrary.

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

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

MS. ROBIN-VERGEER: That's --

QUESTION: -- in making the decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: But what -- what the purpose was.

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

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

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

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

QUESTION: This -- this goes to the importance

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

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

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

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

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

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

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

MS. ROBIN-VERGEER: Correct.

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

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

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

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

MS. ROBIN-VERGEER: I have --

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

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

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

adduced.

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

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

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

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

QUESTION: It wasn't until later.

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

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

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

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

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

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

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

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

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

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

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

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

MS. ROBIN-VERGEER: The --

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

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

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

The lower courts never got that far.

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

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

QUESTION: There's nothing in those facts that

suggests you could find them in 2 hours.

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

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

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

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

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

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

MS. ROBIN-VERGEER: Correct. Correct.

And the sheriff's office could have gone out.

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

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

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

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

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

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

MS. ROBIN-VERGEER: No.

(Laughter.)

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

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

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

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

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

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

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

QUESTION: But the Missouri Court of Appeals

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

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

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

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

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

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

MS. ROBIN-VERGEER: What rule 24 --

QUESTION: One of the reasons.

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

QUESTION: Where are you reading from?

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

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

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

QUESTION: And they had come voluntarily.

MS. ROBIN-VERGEER: And --

QUESTION: They had not come by subpoena. They

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

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

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

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

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

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

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

people and bring them back within a reasonable time?

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

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

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

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

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

MS. ROBIN-VERGEER: You have witnesses who

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

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

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

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

MS. ROBIN-VERGEER: Correct?

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

MS. ROBIN-VERGEER: Correct, correct.

QUESTION: There is a --

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

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

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

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

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

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

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

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

MS. ROBIN-VERGEER: The record --

QUESTION: But he doesn't mention that --

MS. ROBIN-VERGEER: The record --

QUESTION: -- 2 weeks later.

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

QUESTION: I know it is.

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

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

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

MS. ROBIN-VERGEER: Correct.

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

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

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

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

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

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

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

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

QUESTION: Very well, Ms. Vergeer.

Mr. Wilson, we'll hear from you.

ORAL ARGUMENT OF PAUL C. WILSON

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: That's not --

MR. WILSON: That is not correct.

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

QUESTION: Well, at least --

MR. WILSON: And second --

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

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

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

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

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

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

QUESTION: Isn't that right?

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

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

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

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

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

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

MR. WILSON: The trial judge could have been

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

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

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

First, counsel had committed to this trial schedule.

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

Third --

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

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

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

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

QUESTION: No. Trial counsel was in court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Second --

QUESTION: The question was --

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

MR. WILSON: Justice Breyer --

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

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

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

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

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

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

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

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

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

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

in front of the judge anyway.

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

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

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

Second --

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

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

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

that, do you, that there --

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

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

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

QUESTION: But the judge heard the statement.

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

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

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

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

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

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

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

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

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

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

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

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

MR. WILSON: Or any other --
QUESTION: Because in fact he did not have the lawyer's assurance.
MR. WILSON: That's correct.
QUESTION: But he did --
QUESTION: Actually I asked the question that I'd like an answer to. The question that I asked you was whether you're prepared to say right now that the judge did not know that the purpose of these witnesses was to testify that the defendant was in California at the time. I didn't ask you the question that Justice Scalia asked. I asked you my question. I'd like to know the answer to my question.
MR. WILSON: I believe that the -- that the judge knew what had been said -- what had been attributed to them in the opening statement. I -- that is not the test that 24.10 requires. That's not the --
QUESTION: That's a different -- well, if you're -- you're willing to say, which I think is fair and I think correct, that on the basis of this record, the judge knew that the point of these witnesses was to testify that the defendant was in California at the time.
MR. WILSON: At the most --
QUESTION: The answer to my question is yes. Is that right?

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

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

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

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

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

QUESTION: -- because we have the transcript

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

MR. WILSON: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. WILSON: Excuse me?

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

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

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

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

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

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

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

oath or gives him 2 minutes to write something out. You're not resting on that, are you?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

he can simply make the statement orally.

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

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

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

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

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

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

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

MR. WILSON: Yes, that is clear.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

QUESTION: Thank you, Mr. Wilson.

Ms. Vergeer, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF BONNIE I. ROBIN-VERGEER

ON BEHALF OF THE PETITIONER

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

by the wayside because he was on the stand.

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

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

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

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

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

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

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

If there are no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Vergeer.

The case is submitted.

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