SUPREME COURT OF THE UNITED STATES

No. 00–6933

REMON LEE, PETITIONER *v.* MIKE KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[January 22, 2002]

JUSTICE KENNEDY, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The Court's decision commits us to a new and, in my view, unwise course. Its contextual approach places unnecessary and unwarranted new responsibilities on state trial judges, injects troubling instability into the criminal justice system, and reaches the wrong result even under its own premises. These considerations prompt my respectful dissent.

I

The rule that an adequate state procedural ground can bar federal review of a constitutional claim has always been "about federalism," *Coleman* v. *Thompson,* 501 U. S. 722, 726 (1991), for it respects state rules of procedure while ensuring that they do not discriminate against federal rights. The doctrine originated in cases on direct review, where the existence of an independent and adequate state ground deprives this Court of jurisdiction. The rule applies with equal force, albeit for somewhat different reasons, when federal courts review the claims of state prisoners in habeas corpus proceedings, where ignoring procedural defaults would circumvent the jurisdictional limits of direct review and "undermine the State's interest

in enforcing its laws." *Id.,* at 731.

Given these considerations of comity and federalism, a procedural ground will be deemed inadequate only when the state rule "force[s] resort to an arid ritual of meaningless form." *Staub* v. *City of Baxley,* 355 U. S. 313, 320 (1958). *Staub*'s formulation was imprecise, but the cases that followed clarified the two essential components of the adequate state ground inquiry: first, the defendant must have notice of the rule; and second, the State must have a legitimate interest in its enforcement.

The Court need not determine whether the requirement of Missouri Supreme Court Rule 24.09 that all continuance motions be made in writing would withstand scrutiny under the second part of this test (or, for that matter, whether Lee had cause not to comply with it, cf. *infra,* at 19). Even if it could be assumed, for the sake of argument, that Rule 24.09 would not afford defendants a fair opportunity to raise a federal claim, the same cannot be said of Rule 24.10. The latter Rule simply requires a party requesting a continuance on account of missing witnesses to explain why it is needed, and the Rule serves an undoubted and important state interest in facilitating the orderly management of trials. Other States have similar requirements. See, *e.g.,* Ind. Code §35–36–7–1(b) (1993); La. Code Crim. Proc. Ann., Art. 709 (West 1981); Miss. Code Ann. §99–15–29 (1972); Okla. Stat., Tit. 12, §668 (1993); S. C. Rule Crim. Proc. 7(b) (1990); Tex. Code Crim. Proc. Ann., Art. 29.06 (Vernon 1965); Vt. Rule Crim. Proc. 50(c)(1) (1983); Wash. Rev. Code §10.46.080 (1990). The Court's explicit deprecation of Rule 24.10—and implicit deprecation of its many counterparts—is inconsistent with the respect due to state courts and state proceedings.

A

The initial step of the adequacy inquiry considers whether the State has put litigants on notice of the rule.

The Court will disregard state procedures not firmly established and regularly followed. In *James* v. *Kentucky,* 466 U. S. 341, 346 (1984), for example, the rule was "not always clear or closely hewn to"; in *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 457 (1958), "petitioner could not fairly be deemed to have been apprised of [the rule's] existence." As the majority acknowledges, *ante,* at 13, Rule 24.10 is not in this category, for unlike the practices at issue in *James* and *Patterson*, Rule 24.10 is codified and followed in regular practice.

Several of the considerations offered in support of today's decision, however, would seem to suggest that the Court believes Rule 24.10 was not firmly established or regularly followed at the time of Lee's trial. For example, the majority cites the lack of published decisions directing flawless compliance with the Rule in the unique circumstances this case presents. *Ante,* at 19. While this description of Missouri law is dubious, see, *e.g., State* v. *Scott*, 487 S. W. 2d 528, 530 (Mo. 1972), the Court's underlying, quite novel argument ignores the nature of rulemaking. If the Court means what it says on this point, few procedural rules will give rise to an adequate state ground. Almost every case presents unique circumstances that cannot be foreseen and articulated by prior decisions, and general rules like Rule 24.10 are designed to eliminate second-guessing about the rule's applicability in special cases. Rule 24.10's plain language admits of no exception, and the Court cites no Missouri case establishing a judge-made exemption in any circumstances, much less circumstances close to these. Its applicability here was clear.

The Court also ventures into new territory by implying that the trial judge's failure to cite the Rule was meaningful, *ante,* at 2, 16–17, 24, and by noting that he did not give a reason for denying the continuance that could have been addressed by a motion complying with the Rule, *ante,*

at 18. If these considerations were significant, however, we would have relied upon them in previous cases where the trial court's denial of the defendant's motion on the merits was affirmed by the state appellate court because of an uncited procedural defect. See, *e.g., James* v. *Kentucky, supra,* at 343–344; *Staub* v. *City of Baxley, supra,* at 317–318. None of these decisions used this rationale to disregard a state procedural rule, and with good reason. To require trial judges, as a matter of federal law, to cite their precise grounds for decision would place onerous burdens on the state courts, and it is well settled that an appellate tribunal may affirm a trial court's judgment on any ground supported by the record. See *Smith* v. *Phillips,* 455 U. S. 209, 215, n. 6 (1982). Here, moreover, the uncited procedural rule was designed both to "permi[t] the trial court to pass on the merits," *State* v. *Robinson,* 864 S. W. 2d 347, 349 (Mo. Ct. App. 1993), and to facilitate the appellate court's review of asserted due process errors. Notwithstanding the Court's guess about the judge's and prosecution's inner thoughts concerning the completeness of Lee's motion, see *ante,* at 17, the Missouri Court of Appeals tells us that Lee's failure to comply with the Rule is considered consequential as a matter of state law. If Lee had complied with Rule 24.10, the trial court might have granted the continuance or given a different reason for denying it. The trial court, in effect, is deemed to have relied on Rule 24.10 when it found Lee had not made a sufficient showing.

Lee was on notice of the applicability of Rule 24.10, and the Court appears to recognize as much. The consideration most important to the Court's analysis, see *ante,* at 19, relates not to this initial question, but rather to the second part of the adequacy inquiry, which asks whether the rule serves a legitimate state interest. Here, too, in my respectful view, the Court errs.

B

A defendant's failure to comply with a firmly established and regularly followed rule has been deemed an inadequate state ground only when the State had no legitimate interest in the rule's enforcement. *Osborne* v. *Ohio,* 495 U. S. 103, 124 (1990); *James* v. *Kentucky*, *supra,* at 349; *Michigan* v. *Tyler,* 436 U. S. 499, 512, n. 7 (1978). Most state procedures are supported by various legitimate interests, so established rules have been set aside only when they appeared to be calculated to discriminate against federal law, or, as one treatise puts it, they did not afford the defendant "a reasonable opportunity to assert federal rights." 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure, §4027, p. 392 (2d ed. 1996) (hereinafter Wright & Miller). See, *e.g., Douglas* v. *Alabama,* 380 U. S. 415, 422–423 (1965) (rule requiring continuous repetition of identical constitutional objections); *Staub* v. *City of Baxley,* 355 U. S., at 317–318 (rule requiring defendant to challenge constitutionality of individual sections of statute); *Davis* v. *Wechsler,* 263 U. S. 22, 24 (1923) (rule waiving jurisdictional objections upon entry of appearance of federal defendant's successor-in-interest).

In light of this standard, the adequacy of Rule 24.10 has been demonstrated. Delays in criminal trials can be "a distinct reproach to the administration of justice," *Powell* v. *Alabama*, 287 U. S. 45, 59 (1932), and States have a strong interest in ensuring that continuances are granted only when necessary. Rule 24.10 anticipates that at certain points during a trial, important witnesses may not be available. In these circumstances, a continuance may be appropriate if the movant makes certain required representations demonstrating good cause to believe the continuance would make a real difference to the case.

The Court acknowledges, as it must, that Rule 24.10 does not discriminate against federal law or deny defen-

dants a reasonable opportunity to assert their rights. Instead, the Rule "serves a governmental interest of undoubted legitimacy" in "arm[ing] trial judges with the information needed to rule reliably on a motion to delay a scheduled criminal trial." *Ante,* at 21. Nor is there any doubt Lee did not comply with the Rule, for the Missouri court's word on that state-law question is final. See *Elmendorf* v. *Taylor,* 10 Wheat. 152, 159–160 (1825) (Marshall, C. J.). The Court's acceptance of these two premises should lead it to conclude that Lee's violation of the Rule was an adequate state ground for the Missouri court's decision.

Yet the Court deems Lee's default inadequate because, it says, to the extent feasible under the circumstances, he substantially complied with the Rule's essential requirements. *Ante,* at 22. These precise terms have not been used in the Court's adequacy jurisprudence before, and it is necessary to explore their implications. The argument is not that Missouri has no interest in enforcing compliance with the Rule in general, but rather that it had no interest in enforcing full compliance in this particular case. This is so, the Court holds, because the Rule's essential purposes were substantially served by other procedural devices, such as opening statement, *voir dire*, and Lee's testimony on the stand. These procedures, it is said, provided the court with the information the Rule requires the motion itself to contain. *Ante,* at 19–22. So viewed, the Court's substantial-compliance terminology begins to look more familiar: It simply paraphrases the flawed analytical approach first proposed by the Court in *Henry* v. *Mississippi,* 379 U. S. 443 (1965), but not further ratified or in fact used to set aside a procedural rule until today.

Before *Henry*, the adequacy inquiry focused on the general legitimacy of the established procedural rule, overlooking its violation only when the rule itself served

no legitimate interest. See, *e.g., Douglas* v. *Alabama, supra,* at 422–423; *Davis* v. *Wechsler, supra,* at 24. *Henry* was troubling, and much criticized, because it injected an as-applied factor into the equation. See, *e.g.*, R. Fallon, D. Meltzer, & D. Shapiro, Hart and Weschsler's The Federal Courts and the Federal System 584 (4th ed. 1996) (hereinafter Hart & Wechsler) (calling this element of *Henry* "radical"); 16B Wright & Miller §4028, at 394 (arguing that *Henry*'s approach—under which "state procedural rules may accomplish forfeiture only if necessary to further a legitimate state interest in the actual circumstances of application to the very case before the court"—"unduly subordinates state interests"); cf. *ante,* at 13 ("There are . . . exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate"). The petitioner in *Henry* had defaulted his Fourth Amendment claim in state court by failing to lodge a contemporaneous objection to the admission of the contested evidence. Despite conceding the legitimate state interest in enforcing this common rule, the Court vacated the state-court judgment, proposing that the default may have been inadequate because the rule's "purpose . . . may have been substantially served by petitioner's motion at the close of the State's evidence asking for a directed verdict." *Henry* v. *Mississippi, supra,* at 448. The suggestion, then, was that a violation of a rule serving a legitimate state interest may be ignored when, in the peculiar circumstances of a given case, the defendant utilized some other procedure serving the same interest.

For all *Henry* possessed in mischievous potential, however, it lacked significant precedential effect. *Henry* itself did not hold the asserted state ground inadequate; instead it remanded for the state court to determine whether "petitioner's counsel deliberately bypassed the opportunity to make timely objection in the state court." 379 U. S., at 449–453. The cornerstone of that analysis, the deliberate-

bypass standard of *Fay* v. *Noia,* 372 U. S. 391, 426–434 (1963), later was limited to its facts in *Wainwright* v. *Sykes,* 433 U. S. 72, 87–88 (1977), and then put to rest in *Coleman* v. *Thompson,* 501 U. S., at 750. Subsequent cases maintained the pre-*Henry* focus on the general validity of the challenged state practice, either declining to cite *Henry* or framing its holding in innocuous terms. See, *e.g., James* v. *Kentucky,* 466 U. S., at 349; *Monger* v. *Florida*, 405 U. S. 958 (1972); see also Hart & Wechsler 585–586 (describing the "[d]emise of *Henry*"); 16B Wright & Miller §4020, at 291 ("Later decisions, over a period now measured in decades, are more remarkable for frequently omitting any reference to the *Henry* decision than for clarifying it").

There is no meaningful distinction between the *Henry* Court's analysis and the standard the Court applies today, and this surprising reinvigoration of the case-by-case approach is contrary to the principles of federalism underlying our habeas corpus jurisprudence. Procedural rules, like the substantive laws they implement, are the products of sovereignty and democratic processes. The States have weighty interests in enforcing rules that protect the integrity and uniformity of trials, even when "the reason for the rule does not clearly apply." *Staub* v. *City of Baxley,* 355 U. S., at 333 (Frankfurter, J., dissenting). Regardless of the particular facts in extraordinary cases, then, Missouri has a freestanding interest in Rule 24.10 as a rule.

By ignoring that interest, the majority's approach invites much mischief at criminal trials, and the burden imposed upon States and their courts will be heavy. All requirements of a rule are, in the rulemaker's view, essential to fulfill its purposes; imperfect compliance is thus, by definition, not compliance at all. Yet the State's sound judgment on these matters can now be overridden by a federal court, which may determine for itself, given its

own understanding of the rule's purposes, whether a requirement was essential or compliance was substantial in the unique circumstances of any given case. Henceforth, each time a litigant does not comply with an established state procedure, the judge must inquire, even "in the midst of trial, . . . whether noncompliance should be excused because some alternative procedure might be deemed adequate in the particular situation." Hart & Wechsler 585. The trial courts, then the state appellate courts, and, in the end, the federal habeas courts in numerous instances must comb through the full transcript and trial record, searching for ways in which the defendant might have substantially complied with the essential requirements of an otherwise broken rule.

The Court seeks to ground its renewal of *Henry*'s long-quiescent dictum in our more recent decision in *Osborne* v. *Ohio,* 495 U. S., at 122–125. Though isolated statements in *Osborne* might appear to support the majority's approach—or, for that matter, *Henry*'s approach—*Osborne*'s holding does not.

This case bears little resemblance, if any, to *Osborne*. The Ohio statute in question there made it criminal to possess a photograph of a minor in "a state of nudity." Ohio Rev. Code Ann. §2907.323(A)(3) (Supp. 1989). In a pretrial motion to dismiss, Osborne objected to the statute as overbroad under the First Amendment. The state trial court denied the motion, allowed the case to proceed, and adopted no limiting construction of the statute when it instructed the jury on the elements of the crime.

In his appeal to the Ohio Supreme Court, Osborne argued that the statute violated the First Amendment for two reasons: first, it prohibited the possession of nonlewd material; and second, it lacked a scienter requirement. In rejecting the first contention, the appellate court did what the trial court had not: It adopted a limiting construction so that "nudity constitute[d] a lewd exhibition or in-

volve[d] a graphic focus on the genitals." *State* v. *Young,* 37 Ohio St. 3d 249, 252, 525 N. E. 2d 1363, 1368 (1988). In addressing Osborne's second point, the Ohio Supreme Court noted that another Ohio statute provided a *mens rea* of recklessness whenever, as was the case there, the criminal statute at issue was silent on the question. *Id.,* at 252–253, 525 N. E. 2d, at 1368 (citing Ohio Rev. Code Ann. §2901.21(B) (1987)). Osborne also argued that his due process rights were violated because the trial court had not instructed the jury on the elements of lewdness and recklessness that the Ohio Supreme Court had just read into the statute. The appellate court rejected this claim on procedural grounds, observing that Osborne "neither requested such charge[s] nor objected to the instructions as given." 37 Ohio St. 3d, at 254, 258, 525 N. E. 2d, at 1369, 1373 (citing Ohio Rule Crim. Proc. 30(A) (1989)).

When Osborne's case reached this Court, the parties' due process discussion focused on the merits, not the procedural bar. "It is a violation of due process," Osborne's brief argued, "where . . . a state supreme court adds new elements to save a statute and then affirms the conviction." Brief for Appellant, O. T. 1989, No. 88–5986, p. 25. Ohio's response, contending that the appellate court's limiting construction was "foreseeable," mentioned the procedural rule in a short, conclusory paragraph. Brief for Appellee, O. T. 1989, No. 88–5986, pp. 43–44. Against this backdrop, we decided the asserted procedural ground was adequate to block our assessment of the scienter claim but not the lewdness claim. *Osborne* v. *Ohio, supra,* at 125–126. This was not the watershed holding today's majority makes it out to be. The procedure invoked by the State with respect to lewdness required defendants in all overbreadth cases to take one of two steps, neither of which comported with established adequacy principles.

First, Ohio's primary contention was, as we noted, "that

counsel should . . . have insisted that the court instruct the jury on lewdness" by proposing an instruction mirroring the unforeseeable limiting construction the Ohio Supreme Court would later devise. 495 U. S., at 124. To the extent the State required defendants to exhibit this sort of prescience, it placed a clear and unreasonable burden upon their due process rights. *Shuttlesworth* v. *Birmingham,* 394 U. S. 147, 155–157 (1969); see also *Osborne* v. *Ohio*, *supra*, at 118 ("[W]here a State Supreme Court narrows an unconstitutionally overbroad statute, the State must ensure that the defendants are convicted under the statute as it is subsequently construed and not as it was originally written"). Osborne might, for example, have guessed "obscenity" rather than mere "lewdness," or "focus on the genitals" without the additional "lewdness" option; yet according to the State, neither proposed instruction would have preserved his federal claim. That our decision was based on this foreseeability concern is evident from our discussion of the state court's treatment of the scienter question. This holding was supported by an adequate state ground, we found, because the state statute cited by the Ohio Supreme Court "state[d] that proof of scienter is required in instances, like the present one, where a criminal statute does not specify the applicable mental state." 495 U. S., at 123. In other words, while the recklessness element was foreseeable (and in fact established by statute), the lewdness element was not.

Second, to the extent Ohio faulted the defendant for not raising a more general objection to the jury instructions, *Osborne* followed from *Douglas* v. *Alabama*, 380 U. S., at 420–423. In *Douglas*, the defendant was required to repeat, again and again, the same Confrontation Clause objection while his co-defendant's confession was read to the jury. The trial court's initial adverse ruling foreclosed the possibility that the subsequent objections would be sustained. Ohio's treatment of overbreadth objections

raised similar concerns. By ruling on and rejecting the pretrial objection—at the time when overbreadth challenges are generally made—the trial court would make its position on lewdness clear. The case would continue on the assumption that the statute was not overbroad and that possession of nonlewd materials could be a criminal offense. Any evidence the defendant introduced to establish that the photographs were not lewd would be irrelevant, and likely objectionable on this ground. As both a logical and a practical matter, then, the ruling at the trial's outset would foreclose a lewdness instruction at the trial's close. Ohio's requirement that the defendant nonetheless make some sort of objection to the jury instructions, as we concluded, served "no perceivable state interest." 495 U. S., at 124 (internal quotation marks omitted). On this point, too, the *Osborne* Court's different conclusion with respect to scienter is enlightening. Osborne did not argue in an appropriate pretrial motion that the other Ohio statute supplied the recklessness element, so no ruling precluded him from admitting evidence on *mens rea* or requesting a recklessness instruction.

Osborne thus stands for the proposition that once a trial court rejects an overbreadth challenge, the defendant cannot be expected to predict an unforeseeable limiting construction later adopted by the state appellate court or to lodge a foreclosed objection to the jury instructions. That holding, of course, has no relevance to the case at hand. Rule 24.10 does not require defendants to foresee the unforeseeable, and no previous ruling precluded the trial court from granting Lee's continuance motion. And though the *Osborne* Court's analysis was tailored to First Amendment overbreadth concerns, it did not adopt the majority's fact-specific approach. *Osborne*'s rationale would apply to all overbreadth cases without regard to whether their facts were unique or their circumstances were extraordinary. The majority's suggestion to the

contrary exaggerates the importance of certain language employed by the *Osborne* Court. We did take note of the "sequence of events," 495 U. S., at 124, but only because in all overbreadth cases, Ohio procedure mandated a sequence whereby defendants were required to predict unforeseeable limiting constructions before they were adopted or to lodge objections foreclosed by previous rulings. We also mentioned the trial's brevity, *id.,* at 123–124, but that fleeting reference was not only unnecessary but also in tension with the *Osborne* Court's analysis. The adequacy doctrine would have dictated the same result, brief trial or no.

The *Osborne* decision did not lay the groundwork for today's revival of *Henry* v. *Mississippi*. Yet even if it made sense to consider the adequacy of state rules on a case-by-case basis, the Court would be wrong to conclude that enforcement of Rule 24.10 would serve no purpose in this case. Erroneous disregard of state procedural rules will be common under the regime endorsed by the Court today, for its basic assumption—that the purposes of a particular state procedure can be served by use of a rather different one—ignores the realities of trial. The Court here sweeps aside as unnecessary a rule that would have produced the very predicate the trial court needed to grant the motion: an assurance that the defense witnesses were still prepared to offer material testimony.

The majority contends that Lee compensated for any inadequacies in his motion, even if through inadvertence, by various remarks and observations made during earlier parts of the trial. To reach this conclusion, the Court must construe counsel's statements with a pronounced liberality. Even if we could assume, however, that Lee and his lawyer provided all the required information at some point, we could not conclude that "th[e] purpose of the . . . rule" was "substantially served," *Henry* v. *Mississippi*, 379 U. S., at 448, or, in the terms used by today's majority,

that "the Rule's essential requirements . . . were substantially met," *ante,* at 22. The most critical information the Rule requires—"[W]hat particular facts the affiant believes the witness will prove"—was revealed not at the time of the motion, but at earlier stages: *voir dire*, opening statements, and perhaps, the majority speculates, the charge conference. *Ante,* at 21. To say the essential requirements of Rule 24.10 were met, then, is to assume the requirement that representations be made at the time of the motion is not central to the Rule or its objectives.

This assumption ignores the State's interest in placing all relevant information before the trial court when the motion is made, rather than asking the judge to rely upon his or her memory of earlier statements. Cf. *Ungar* v. *Sarafite*, 376 U. S. 575, 589 (1964) (test for determining whether denial of continuance violated due process considers "particularly . . . the reasons presented to the trial judge at the time the request is denied"). The assumption looks past the State's corresponding interest in facilitating appellate review by placing all information relevant to the continuance motion in a single place in the record. The assumption also ignores the plain fact that the posture of this case was far different when Lee made his continuance motion than it was at the outset of the trial. Even if the judge recalled the precise details of *voir dire* and opening statements (as the majority believes, see *ante,* at 21), the State's interest in requiring Lee to make the representations after the prosecution rested was no less pronounced.

As the very existence of rules like Rule 24.10 indicates, seasoned trial judges are likely to look upon continuance motions based on the absence of witnesses with a considerable degree of skepticism. This case was no different, for the trial judge suspected that the witnesses had abandoned Lee. The majority is simply wrong to suggest that no one in the courtroom harbored a doubt about what Lee's family members would have said if they had re-

turned. See *ante,* at 21. On the contrary, in light of the witnesses' sudden disappearance, it is more likely that no one in the courtroom would have had any idea what to expect.

The Court fails to recognize that the trial judge was quite capable of distinguishing between counsel's brave promises to the jury at various stages of the trial and what counsel could in fact deliver when the continuance was sought. There is nothing unusual about lawyers using hyperbole in statements to the jury but then using careful and documented arguments when making representations to the court in support of requests for specific rulings. Trial judges must distinguish between the two on a daily basis. In closing argument, for example, defense counsel told the jury:

> "I'm an old man, been in this business 43 years, seen a little of criminal cases. Never seen one as weak as this." Tr. 618.

Quite aside from the prosecutor's predictable response—"he said that in the last case I tried with him too," *id.,* at 620—the rhetoric was an ill fit with the routine, mechanical way defense counsel presented his motion for acquittal, with the jury absent, at the close of the prosecution's case. He gave not one specific reason to grant the motion, his complete argument consisting of the following:

> "MR. McMULLIN: I'll file it. I left it in the office. There's nothing exceptional in it. The defendant—that we move for judgment of acquittal for the reason that the State's evidence is insufficient as a matter of law to sustain a conviction and that should be easily disposed of." *Id.,* at 489.

These are the customary dynamics of trial, perhaps; but the whole course of these proceedings served to confirm what the trial judge told counsel at the outset of the case:

"I don't have a lot of faith in what's said in opening statement." *Id.,* at 173. Opening statements can be imprecise, and are sometimes designed to force the opposition's hand or shape the jurors' perception of events. When the time came for presentation of the defense case, counsel faced significant obstacles in establishing the alibi he had promised before. Indeed, it is a fair inference to say the alibi defense had collapsed altogether. Two witnesses with no connection to the defendants or the crime identified Lee as the driver of the automobile used by the passenger-gunman. Any thought that difficulties with these eyewitnesses' identification might give Lee room to present his alibi defense was dispelled by two additional witnesses for the prosecution. Both had known Lee for a considerable period of time, so the chances of mistaken identity were minimal. Both saw him in Kansas City—not in California—on the night before the murder. He was not only in town, they testified, but also with the shooter and looking for the victim.

Faced with this and other evidence adduced by the prosecution, defense counsel elected to open not with the alibi witnesses whose testimony was supposed to be so critical, but rather with two witnesses who attempted to refute a collateral aspect of the testimony given by one of the prosecution's eyewitnesses. Only then did the defense call the alibi witnesses, who were to testify that Lee went to California to attend a birthday party in July 1992 and did not return to Kansas City until October. At this point the case was far different from what defense counsel might have hoped for at the opening.

When Lee's witnesses were then reported missing, the judge had ample reason to believe they had second thoughts about testifying. All three of Lee's family members had traveled from California to testify, but all three left without speaking to Lee or his lawyer. Two sets of witnesses, four persons in all, had just placed Lee in Kan-

sas City; and the prosecution had said it had in reserve other witnesses prepared to rebut the alibi testimony. Lee had been sentenced to 80 years in Missouri prison for an unrelated armed assault and robbery, and any witness who was considering perjury would have had little inducement to take that risk—a risk that would have became more pronounced after the prosecution's witnesses had testified—if Lee would serve a long prison term in any event. The judge's skepticism seems even more justified when it is noted that six weeks later, during a hearing on Lee's motion for a new trial, counsel still did not explain where Lee's family members had gone or why they had left. It was not until 17 months later, in an amended motion for postconviction relief, that Lee first gave the Missouri courts an explanation for his family's disappearance.

Before any careful trial judge granted a continuance in these circumstances, he or she would want a representation that the movant believed the missing witnesses were still prepared to offer the alibi testimony. Cf. *Avery* v. *Alabama,* 308 U. S. 444, 446 (1940) (propriety of continuance, for the purposes of the Fourteenth Amendment, must be "decided by the trial judge in the light of facts then presented and conditions then existing"). If Lee and his counsel had any reason to believe his witnesses had not abandoned him, this representation would not have been difficult to make, and the trial judge would have had reason to credit it. Yet defense counsel was careful at all stages to avoid making this precise representation. In his opening statement he said:

> "We will put on three witnesses for the defense, and you will see them and be able to evaluate them and see whether or not they're liars or not. You can determine for yourself." App. 12.

When he moved for the continuance, Lee's counsel, consis-

tent with his guarded approach, would not say the witnesses would still testify as advertised:

> "THE COURT: The folks were here today. They were seen here on this floor of the courthouse, and they apparently simply have abandoned—
>
> MR. McMULLIN: Well—
>
> THE COURT: —the defendant in—although they're family, despite the fact that they're under subpoena.
>
> MR. McMULLIN: It looks like that, Judge. I don't know. I would—I can neither confirm nor deny." *Id.,* at 22.

No one—not Lee, not his attorney—stood before the court and expressed a belief, as required by Rule 24.10, that the missing witnesses would still testify that Lee had been in California on the night of the murder. Without that assurance, the judge had little reason to believe the continuance would be of any use. In concluding that the purposes of Rule 24.10 were served by promises made in an opening statement, the majority has ignored one of the central purposes of the Rule.

In sum, Rule 24.10 served legitimate state interests, both as a general matter and as applied to the facts of this case. Lee's failure to comply was an adequate state ground, and the Court's contrary determination does not bode well for the adequacy doctrine or federalism.

II

A federal court could consider the merits of Lee's defaulted federal claim if he had shown cause for the default and prejudice therefrom, see *Wainwright* v. *Sykes,* 433 U. S., at 90–91, or made out a compelling case of actual innocence, see *Schlup* v. *Delo,* 513 U. S. 298, 314–315 (1995). He has done neither.

As to the first question, Lee says the sudden disappearance of his witnesses caused him to neglect Rule 24.10. In

one sense, of course, he is right, for he would not have requested the continuance, much less failed to comply with Rule 24.10, if his witnesses had not left the courthouse. The argument, though, is unavailing. The cause component of the cause-and-prejudice analysis requires more than a but-for causal relationship between the cause and the default. Lee must also show, given the state of the trial when the motion was made, that an external factor "impeded counsel's efforts to comply with the State's procedural rule." *Murray* v. *Carrier,* 477 U. S. 478, 488 (1986). While the departure of his key witnesses may have taken him by surprise (and caused him not to comply with Rule 24.09's writing requirement), nothing about their quick exit stopped him from making a complete oral motion and explaining their absence, the substance of their anticipated testimony, and its materiality.

Nor has Lee shown that an evidentiary hearing is needed to determine whether "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.,* at 496. To fall within this "narrow class of cases," *McCleskey* v. *Zant,* 499 U. S. 467, 494 (1991), Lee must demonstrate "that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup* v. *Delo, supra,* at 327, 314–315. Lee would offer the testimony of his mother, stepfather, and sister; but to this day, almost eight years after the trial, Lee has not produced a shred of tangible evidence corroborating their story that he had flown to California to attend a 4-month long birthday party at the time of the murder. To acquit, the jury would have to overlook this problem, ignore the relatives' motive to concoct an alibi for their kin, and discount the prosecution's four eyewitnesses. Even with the relatives' testimony, a reasonable juror could vote to convict.

* * *

"Flying banners of federalism, the Court's opinion actually raises storm signals of a most disquieting nature." So wrote Justice Harlan, dissenting in *Henry* v. *Mississippi,* 379 U. S., at 457. The disruption he predicted failed to spread, not because *Henry*'s approach was sound but because in later cases the Court, heeding his admonition, refrained from following the course *Henry* prescribed. Though the Court disclaims reliance upon *Henry*, it has in fact revived that case's discredited rationale. Serious doubt is now cast upon many state procedural rules and the convictions sustained under them.

Sound principles of federalism counsel against this result. I would affirm the judgment of the Court of Appeals.