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 GINSBURG delivered the opinion of the Court.

Petitioner Remon Lee asserts that a Missouri trial court deprived him of due process when the court refused to grant an overnight continuance of his trial. Lee sought the continuance to locate subpoenaed, previously present, but suddenly missing witnesses key to his defense against felony charges. On direct review, the Missouri Court of Appeals disposed of the case on a state procedural ground. That court found the continuance motion defective under the State's rules. It therefore declined to consider the merits of Lee's plea that the trial court had denied him a fair opportunity to present a defense. Whether the state ground dispositive in the Missouri Court of Appeals is adequate to preclude federal habeas corpus review is the question we here consider and decide.

On the third day of his trial, Lee was convicted of first-degree murder and armed criminal action. His sole affirmative defense was an alibi; Lee maintained he was in California, staying with his family, when the Kansas City crimes for which he was indicted occurred. Lee's mother, stepfather, and sister voluntarily came to Missouri to

testify on his behalf. They were sequestered in the courthouse at the start of the trial's third day. For reasons then unknown, they were not in the courthouse later in the day when defense counsel sought to present their testimony. Discovering their absence, defense counsel moved for a continuance until the next morning so that he could endeavor to locate the three witnesses and bring them back to court.

The trial judge denied the motion, stating that it looked to him as though the witnesses had "in effect abandoned the defendant" and that, for personal reasons, he would "not be able to be [in court the next day] to try the case." Furthermore, he had "another case set for trial" the next weekday. App. 22. The trial resumed without pause, no alibi witnesses testified, and the jury found Lee guilty as charged.

Neither the trial judge nor the prosecutor identified any procedural flaw in the presentation or content of Lee's motion for a continuance. The Missouri Court of Appeals, however, held the denial of the motion proper because Lee's counsel had failed to comply with Missouri Supreme Court Rules not relied upon or even mentioned in the trial court: Rule 24.09, which requires that continuance motions be in written form, accompanied by an affidavit; and Rule 24.10, which sets out the showings a movant must make to gain a continuance grounded on the absence of witnesses.

We hold that the Missouri Rules, as injected into this case by the state appellate court, did not constitute a state ground adequate to bar federal habeas review. Caught in the midst of a murder trial and unalerted to any procedural defect in his presentation, defense counsel could hardly be expected to divert his attention from the proceedings rapidly unfolding in the courtroom and train, instead, on preparation of a written motion and affidavit. Furthermore, the trial court, at the time Lee moved for a

continuance, had in clear view the information needed to rule intelligently on the merits of the motion. Beyond doubt, Rule 24.10 serves the State's important interest in regulating motions for a continuance—motions readily susceptible to use as a delaying tactic. But under the circumstances of this case, we hold that petitioner Lee, having substantially, if imperfectly, made the basic showings Rule 24.10 prescribes, qualifies for adjudication of his federal, due process claim. His asserted right to defend should not depend on a formal "ritual . . . [that] would further no perceivable state interest." *Osborne* v. *Ohio,* 495 U. S. 103, 124 (1990) (quoting *James* v. *Kentucky,* 466 U. S. 341, 349 (1984) (in turn quoting *Staub* v. *City of Baxley,* 355 U. S. 313, 320 (1958))) (internal quotation marks omitted).

I

On August 27, 1992, Reginald Rhodes shot and killed Steven Shelby on a public street in Kansas City, Missouri. He then jumped into the passenger side of a waiting truck, which sped away. Rhodes pleaded guilty, and Remon Lee, the alleged getaway driver, was tried for first-degree murder and armed criminal action.

Lee's trial took place within the span of three days in February 1994. His planned alibi defense—that he was in California with his family at the time of the murder—surfaced at each stage of the proceedings. During *voir dire* on the first day of trial, Lee's court-appointed defense attorney informed prospective jurors that "[t]here will be a defense in this case, which is a defense of alibi." App. 10; see also *ibid.* ("And we'll put on evidence—I can't go into it now—that he was somewhere else, he couldn't commit the crime and I believe the judge will give an instruction on alibi at the conclusion of my case."). Later in the *voir dire*, defense counsel identified the three alibi witnesses as Lee's mother, Gladys Edwards, Lee's sister, Laura Lee,

and Lee's stepfather, James Edwards, a minister. *Id.,* at 11–13.

The planned alibi defense figured prominently in counsels' opening statements on day two of Lee's trial. The prosecutor, at the close of her statement, said she expected an alibi defense from Lee and would present testimony to disprove it. Tr. 187. Defense counsel, in his opening statement, described the alibi defense in detail, telling the jury that the evidence would show Lee was not in Kansas City, and therefore could not have engaged in crime there, in August 1992. App. 12–13. Specifically, defense counsel said three close family members would testify that Lee came to visit them in Ventura, California, in July 1992 and stayed through the end of October. Lee's mother and stepfather would say they picked him up from the airport at the start of his visit and returned him there at the end. Lee's sister would testify that Lee resided with her and her four children during this time. All three would affirm that they saw Lee regularly throughout his unbroken sojourn. *Ibid.*

During the prosecution case, two eyewitnesses to the shooting identified Lee as the driver. The first, Reginald Williams, admitted during cross-examination that he had told Lee's first defense counsel in a taped interview that Rhodes, not Lee, was the driver. Tr. 285. Williams said he had given that response because he misunderstood the question and did not want to be "bothered" by the interviewer. *Id.,* at 283, 287. The second eyewitness, William Sanders, was unable to pick Lee out of a photographic array on the day of the shooting; Sanders identified Lee as the driver for the first time 18 months after the murder. *Id.,* at 413–414.

Two other witnesses, Rhonda Shelby and Lynne Bryant, were called by the prosecutor. Each testified that she knew Lee and had seen him in Kansas City the night before the murder. Both said Lee was with Rhodes, who

had asked where Steven Shelby (the murder victim) was. *Id.,* at 443–487. The State offered no physical evidence connecting Lee to the murder and did not suggest a motive.

The defense case began at 10:25 a.m. on the third and final day of trial. Two impeachment witnesses testified that morning. Just after noon, counsel met with the trial judge in chambers for a charge conference. At that meeting, the judge apparently agreed to give an alibi instruction submitted by Lee. *Id.,* at 571.[1]

At some point in the late morning or early afternoon, the alibi witnesses left the courthouse. Just after one o'clock, Lee took the stand outside the presence of the jury and, for the record, responded to his counsel's questions concerning his knowledge of the witnesses' unanticipated absence. App. 15. Lee, under oath, stated that Gladys and James Edwards and Laura Lee had voluntarily traveled from California to testify on his behalf. *Id.,* at 16. He affirmed his counsel's representations that the three witnesses, then staying with Lee's uncle in Kansas City, had met with Lee's counsel and received subpoenas from him; he similarly affirmed that the witnesses had met with a Kansas City police officer, who interviewed them on behalf of the prosecutor. *Id.,* at 16–18. Lee said he had seen his sister, mother, and stepfather in the courthouse that morning at 8:30 and later during a recess.

On discovering the witnesses' absence, Lee could not call them at his uncle's house because there was no phone on the premises. He asked his girlfriend to try to find the witnesses, but she was unable to do so. *Id.,* at 17. Al-

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[1] That Lee had submitted an alibi instruction during the charge conference became apparent when the trial judge, delivering the charge, began to read the proposed instruction. He was interrupted by the prosecutor and defense counsel, who reminded him that the instruction was no longer necessary. Tr. 594–595.

though Lee did not know the witnesses' whereabouts at that moment, he said he knew "in fact they didn't go back to California" because "they had some ministering . . . to do" in Kansas City both Thursday and Friday evenings. *Id.,* at 18. He asked for "a couple hours' continuance [to] try to locate them, because it's very valuable to my case." *Ibid.* Defense counsel subsequently moved for a continuance until the next morning, to gain time to enforce the subpoenas he had served on the witnesses. *Id.,* at 20. The trial judge responded that he could not hold court the next day because "my daughter is going to be in the hospital all day . . . [s]o I've got to stay with her." *Ibid.*

After a brief further exchange between court and counsel,[2] the judge denied the continuance request. The judge observed:

> "It looks to me as though the folks were here and then in effect abandoned the defendant. And that, of course, we can't—we can't blame that on the State. The State had absolutely nothing to do with that. That's—it's too bad. The Court will not be able to be here tomorrow to try the case." *Id.,* at 22.

Counsel then asked for a postponement until Monday (the next business day after the Friday the judge was to spend with his daughter in the hospital). The judge denied that request too, noting that he had another case set for trial that day. *Ibid.*

In a final colloquy before the jury returned to the courtroom, defense counsel told the court he would be making a motion for judgment of acquittal. The judge asked, "You're going to give that to me . . . orally and you'll sup-

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[2] Responding to the court's questions, Lee's counsel said he had copies of the witnesses' written statements and their subpoenas. App. 20–21. Counsel next began to describe the subpoenas. When counsel listed Gladys Edwards, the court asked "[i]s she the mother?" *Id.,* at 21.

plement that with a written motion?" Counsel agreed. *Id.,* at 23.

When the jurors returned, defense counsel informed them that the three witnesses from California he had planned to call "were here and have gone"; further, counsel did not "know why they've gone." *Id.,* at 25. The defense then rested. In closing argument, Lee's counsel returned to the alibi defense he was unable to present. "I do apologize," he said, "I don't know what happened to my witnesses. They're not here. Couldn't put them on on the question of alibi." *Id.,* at 26. The prosecutor commented on the same gap: "Where are those alibi witnesses that [defense counsel] promised you from opening[?] They're not here." *Id.,* at 27.

After deliberating for three hours, the jury convicted Lee on both counts. He was subsequently sentenced to prison for life without possibility of parole. *Id.*, at 43.

The trial court later denied Lee's new trial motion, which Lee grounded, in part, on the denial of the continuance motion. *Id.,* at 31–32, 42. Lee, at first *pro se* but later represented by appointed counsel, next filed a motion for state postconviction relief. Lee argued, *inter alia*, that the refusal to grant his request for an overnight continuance deprived him of his federal constitutional right to a defense. *Id.,* at 56–59.[3] In his postconviction motion, Lee asserted that the three witnesses had left the courthouse because "an unknown person," whom he later identified as an employee of the prosecutor's office, had told them "they were not needed to testify." *Id.,* at 56–58. The postconvic-

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[3]Missouri procedure at the time required Lee to file his postconviction motion in the sentencing court shortly after he filed his notice of direct appeal. See Mo. Sup. Ct. Rule 29.15(b) (1994) (requiring motion to be made within 30 days of filing of court transcript in appellate court considering direct appeal). The direct appeal was "suspended" while the trial court considered the postconviction motion. See Rule 29.15(*l*).

tion court denied the motion, stating that under Missouri law, an allegedly improper denial of a continuance fits within the category "trial error," a matter to be raised on direct appeal, not in a collateral challenge to a conviction. *Id.,* at 70.

Lee's direct appeal and his appeal from the denial of postconviction relief were consolidated before the Missouri Court of Appeals. See Mo. Sup. Ct. Rule 29.15(*l*) (1994). There, Lee again urged that the trial court's refusal to continue the case overnight denied him due process and the right to put on a defense. App. 90–95. In response, the State argued for the first time that Lee's continuance request had a fatal procedural flaw. *Id.,* at 110–115. In particular, the State contended that Lee's application failed to comply with Missouri Supreme Court Rule 24.10 (Rule 24.10), which lists the showings required in a continuance request based on the absence of witnesses.[4] By

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[4] Rule 24.10 reads:

"Misdemeanors or Felonies—Application for a Continuance on Account of Absence of Witnesses Shall Show What

"An application for a continuance on account of the absence of witnesses or their evidence shall show:

"(a) The facts showing the materiality of the evidence sought to be obtained and due diligence upon the part of the applicant to obtain such witness or testimony;

"(b) The name and residence of such witness, if known, or, if not known, the use of diligence to obtain the same, and also facts showing reasonable grounds for belief that the attendance or testimony of such witness will be procured within a reasonable time;

"(c) What particular facts the affiant believes the witness will prove, and that he knows of no other person whose evidence or attendance he could have procured at the trial, by whom he can prove or so fully prove the same facts;

"(d) That such witness is not absent by the connivance, consent, or procurement of the applicant, and such application is not made for vexation or delay, but in good faith for the purpose of obtaining a fair and impartial trial.

"If the court shall be of the opinion that the affidavit is insufficient it

the State's reckoning, Lee's request did not show the materiality of the California witnesses' testimony or the grounds for believing that the witnesses could be found within a reasonable time; in addition, the prosecution urged, Lee failed to "testify that the witnesse[s'] absence was not due to his own procurement." App. 113.

The Missouri Court of Appeals affirmed Lee's conviction and the denial of postconviction relief. *State* v. *Lee*, 935 S. W. 2d 689 (1996); App. 123–131. The appellate court first noted that Lee's continuance motion was oral and therefore did not comply with Missouri Supreme Court Rule 24.09 (Rule 24.09), which provides that such applications shall be in written form, accompanied by an affidavit. App. 126–127.[5] "Thus," the Court of Appeals said, "the trial court could have properly denied the motion for a failure to comply with Rule 24.09." *Id.,* at 127. Even assuming the adequacy of Lee's oral motion, the court continued, the application "was made without the factual showing required by Rule 24.10." *Ibid.* The court did not say which components of Rule 24.10 were unsatisfied. "When a denial to grant a motion for continuance is based on a deficient application," the Court of Appeals next said, "it does not constitute an abuse of discretion." *Ibid.* Lee's subsequent motions for rehearing and transfer to the Missouri Supreme Court were denied.

In January 1998, Lee, proceeding *pro se*, filed an application for writ of habeas corpus in the United States Dis-

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shall permit it to be amended."

[5] Rule 24.09 reads:

"Misdemeanors or Felonies—Application for Continuance—How Made

"An application for a continuance shall be made by a written motion accompanied by the affidavit of the applicant or some other credible person setting forth the facts upon which the application is based, unless the adverse party consents that the application for continuance may be made orally."

trict Court for the Western District of Missouri. *Id.,* at 132. Lee once again challenged the denial of his continuance motion. *Id.,* at 147–152. He appended affidavits from the three witnesses, each of whom swore to Lee's alibi; sister, mother, and stepfather alike stated that they had left the courthouse while the trial was underway because a court officer told them their testimony would not be needed that day. *Id.,* at 168–174.[6] Lee maintained that the State had engineered the witnesses' departure; accordingly, he asserted that prosecutorial misconduct, not anything over which he had control, prompted the need for a continuance. *Id.,* at 148, 155–156.

The District Court denied the writ. No. 98–0074–CV–W–6–P (WD Mo., Apr. 19, 1999), App. 212–218. The witnesses' affidavits were not cognizable in federal habeas proceedings, the court held, because Lee could have offered them to the state courts but failed to do so. *Id.,* at 215 (citing 28 U. S. C. §2254(e) (1994 ed., Supp. V)). The Federal District Court went on to reject Lee's continuance claim, finding in the Missouri Court of Appeals' invocation of Rule 24.10 an adequate and independent state-law ground barring further review. App. 217.

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[6]The witnesses' accounts of their departure from the courthouse were as follows:

Laura Lee: "[T]hose people in Missouri told us we could leave because OUR TESTIMONY would not be needed until the next day." App. 169.

Gladys Edwards: "[T]he officer of the court came and told us that the prosecutor stated that the state[']s case will again take up the remainder of that day. That [o]ur testimony will not be needed until the following day, that we could leave until the following day. He . . . told [u]s not to worry, the Judge knows *[w]e came to testify*, they have [o]ur statements, and the trial will not be over until we testify. So at those instructions we left." *Id.,* at 172.

James Edwards: "[W]hile at the [c]ourthouse, we were told by an officer of the court that [o]ur testimony would not be needed until the following day, we were excused until then." *Id.,* at 174.

The Court of Appeals for the Eighth Circuit granted a certificate of appealability, limited to the question whether Lee's "due process rights were violated by the state trial court's failure to allow him a continuance," *id.,* at 232, and affirmed the denial of Lee's habeas petition. 213 F. 3d 1037 (2000) *(per curiam).* Federal review of Lee's due process claim would be unavailable, the court correctly observed, if the state court's rejection of that claim " 'rest[ed] . . . on a state law ground that is independent of the federal question and adequate to support the judgment,' regardless of 'whether the state law ground is substantive or procedural.' " *Id.,* at 1038 (quoting *Coleman* v. *Thompson,* 501 U. S. 722, 729 (1991)). "The Missouri Court of Appeals rejected Lee's claim because his motion for a continuance did not comply with [Rules] 24.09 and 24.10," the Eighth Circuit next stated. Thus, that court concluded, "the claim was procedurally defaulted." 213 F. 3d, at 1038.[7]

Chief District Judge Bennett, sitting by designation from the District Court for the Northern District of Iowa, dissented. In his view, Rules 24.09 and 24.10 did not supply state-law grounds "adequate" to preclude federal review in the particular circumstances of this case. *Id.,* at 1041–1049.

We granted Lee's *pro se* petition for a writ of certiorari,

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[7] Lee had asked the federal appeals court to excuse the procedural lapse, suggesting that trial counsel's failure to follow Missouri's motion rules qualified as ineffective assistance of counsel. Lee had not exhausted that claim in state court, the Eighth Circuit responded, therefore he could not assert it in federal habeas proceedings. 213 F. 3d, at 1038. Furthermore, the federal appeals court ruled, Lee could not rest on a plea of "actual innocence" to escape the procedural bar because "the factual basis for the [alibi witness] affidavits he relies on as new evidence existed at the time of the trial and could have been presented earlier." *Id.,* at 1039.

531 U. S. 1189 (2001), and appointed counsel, 532 U. S. 956 (2001). We now vacate the Court of Appeals judgment.

II

This Court will not take up a question of federal law presented in a case "if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment." *Coleman* v. *Thompson,* 501 U. S. 722, 729 (1991) (emphases added). The rule applies with equal force whether the state-law ground is substantive or procedural. *Ibid.* We first developed the independent and adequate state ground doctrine in cases on direct review from state courts, and later applied it as well "in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions." *Ibid.* "[T]he adequacy of state procedural bars to the assertion of federal questions," we have recognized, is not within the State's prerogative finally to decide; rather, adequacy "is itself a federal question." *Douglas* v. *Alabama,* 380 U. S. 415, 422 (1965).

Lee does not suggest that Rules 24.09 and 24.10, as brought to bear on this case by the Missouri Court of Appeals, depended in any way on federal law. Nor does he question the general applicability of the two codified Rules. He does maintain that both Rules—addressed initially to Missouri trial courts, but in his case invoked only at the appellate stage—are inadequate, under the extraordinary circumstances of this case, to close out his federal, fair-opportunity-to-defend claim. We now turn to that dispositive issue.[8]

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[8]Missouri argues in two footnotes to its brief that Lee's federal claim fails for a reason independent of Rules 24.09 and 24.10, namely, that he raised only state-law objections to denial of the continuance motion in state court. Brief for Respondent 16, n. 2, 32, n. 7. Lee urges, in

Ordinarily, violation of "firmly established and regularly followed" state rules—for example, those involved in this case—will be adequate to foreclose review of a federal claim. *James* v. *Kentucky,* 466 U. S. 341, 348 (1984); see *Ford* v. *Georgia,* 498 U. S. 411, 422–424 (1991). There are, however, exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question. See *Davis* v. *Wechsler,* 263 U. S. 22, 24 (1923) (Holmes, J.) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."). This case fits within that limited category.

Our analysis and conclusion are informed and controlled by *Osborne* v. *Ohio,* 495 U. S. 103 (1990). There, the Court considered Osborne's objections that his child pornography conviction violated due process because the trial judge had not required the government to prove two elements of the alleged crime: lewd exhibition and scienter. *Id.,* at 107, 122–125. The Ohio Supreme Court held the constitutional objections procedurally barred because Osborne had failed to object contemporaneously to the judge's charge, which did not instruct the jury that it could convict only for conduct that satisfied both the scienter and the lewdness elements. *Id.,* at 107–108, 123; see Ohio Rule Crim. Proc. 30(A) (1989) ("A party may not assign as error the giving or the failure to give any instructions unless he objects

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response, that his direct appeal brief explicitly invoked due process and his right to present witnesses in his defense as guaranteed by the Fifth, Sixth, and Fourteenth Amendments. Reply Brief 11, n. 4 (citing App. 86–87, 90–95). Missouri did not advance its current contention in the State's Eighth Circuit brief or in its brief in opposition to the petition for certiorari. We therefore exercise "our discretion to deem the [alleged] defect waived." *Oklahoma City* v. *Tuttle,* 471 U. S. 808, 816 (1985).

thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection.").

We agreed with the State that Osborne's failure to urge the trial court to instruct the jury on scienter qualified as an "adequate state-law ground [to] preven[t] us from reaching Osborne's due process contention on that point." 495 U. S., at 123. Ohio law, which was not in doubt, required proof of scienter unless the applicable statute specified otherwise. *Id.,* at 112–113, n. 9, 123. The State's contemporaneous objection rule, we observed, "serves the State's important interest in ensuring that counsel do their part in preventing trial courts from providing juries with erroneous instructions." *Id.,* at 123.

"With respect to the trial court's failure to instruct on lewdness, however, we reach[ed] a different conclusion." *Ibid.* Counsel for Osborne had made his position on that essential element clear in a motion to dismiss overruled just before trial, and the trial judge, "in no uncertain terms," *id.,* at 124, had rejected counsel's argument. After a brief trial, the judge charged the jury in line with his ruling against Osborne on the pretrial motion to dismiss. Counsel's failure to object to the charge by reasserting the argument he had made unsuccessfully on the motion to dismiss, we held, did not deter our disposition of the constitutional question. "Given this sequence of events," we explained, it was proper to "reach Osborne's [second] due process claim," for Osborne's attorney had "pressed the issue of the State's failure of proof on lewdness before the trial court and . . . nothing would be gained by requiring Osborne's lawyer to object a second time, specifically to the jury instructions." *Ibid.* In other words, although we did not doubt the general applicability of the Ohio Rule of Criminal Procedure requiring contemporaneous objection to jury charges, we nevertheless concluded that, in this atypical instance, the Rule would serve "no perceivable

state interest." *Ibid.* (internal quotation marks omitted).

Our decision, we added in *Osborne*, followed from "the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here." *Id.,* at 125 (quoting *Douglas,* 380 U. S., at 422 (internal quotation marks omitted)). This general principle, and the unusual "sequence of events" before us—rapidly unfolding events that Lee and his counsel could not have foreseen, and for which they were not at all responsible—similarly guide our judgment in this case.

The dissent strives mightily to distinguish *Osborne*, an opinion JUSTICES KENNEDY and SCALIA joined, but cannot do so convincingly. In an intricate discussion of *Osborne* longer than the relevant section of *Osborne* itself, the dissent crafts its own rationales for the decision and sweeps away language its design cannot accommodate as "unnecessary" and "in tension" with the rest of the Court's analysis, *post*, at 13.

As attentive reading of the relevant pages of *Osborne* will confirm, 495 U. S., at 123–125, we here rely not on "isolated statements" from the opinion, *post*, at 9, but solidly on its analysis and holding on "the adequacy of state procedural bars to the assertion of federal questions." 495 U. S., at 125 (internal quotation marks omitted) (quoting *Douglas*, 380 U. S., at 422).

According to the dissent in this case, *Osborne*'s discrete section trained on the adequacy of state-law grounds to bar federal review had two bases. First, the dissent views as central to *Osborne* the "unforeseeab[ility]" of the Ohio Supreme Court's limiting construction of the child pornography statute at issue there, *i.e.*, that court's addition of the "lewdness" element on which Osborne failed to request a jury charge. *Post*, at 10–11; see also *post*, at 12. The

dissent here is characteristically inventive. *Osborne* spoke not of the predictability *vel non* of the Ohio Supreme Court's construction; instead, this Court asked whether anything "would be gained by requiring Osborne's lawyer to object a second time" on the question of lewdness, 495 U. S., at 124, and answered that question with a firm "no." Tellingly, *Osborne* noted, without criticism, the Ohio Supreme Court's own indication that the limiting construction of the child pornography statute was *not* unpredictable, for it flowed from the "proper purposes" exceptions set out by the Legislature. *Id.*, at 113, n. 10.

Second, the dissent suggests that *Osborne* is enlightening only as to "Ohio's treatment of overbreadth objections." *Post*, at 11–12. *Osborne*, the dissent contends, "stands for the proposition that once a trial court rejects an overbreadth challenge, the defendant cannot be expected . . . to lodge a foreclosed objection to the jury instructions." *Post*, at 12. In truth, Ohio had no special-to-the-First Amendment "requirement." *Ibid.*[9] Rather, Ohio's firmly established, generally applicable practice was a standard contemporaneous objection rule for challenges to jury charges. See Ohio Rule Crim. Proc. 30(A) (1989). As *Osborne* paradigmatically illustrates, that Rule is unassailable in most instances, *i.e.*, it ordinarily serves a legitimate governmental interest; in rare circumstances, however, unyielding application of the general rule would disserve any perceivable interest.

The asserted procedural oversights in Lee's case, his alleged failures fully to comply with Rules 24.09 and

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[9]The discrete section of *Osborne* in point, Part III, cites no First Amendment decision; it relies solely on decisions holding asserted state-law grounds inadequate in other contexts. See *Osborne* v. *Ohio*, 495 U. S. 103, 122–125 (1990) (citing *James* v. *Kentucky,* 466 U. S. 341, 349 (1984); *Davis* v. *Wechsler,* 263 U. S. 22, 24 (1923); *Douglas* v. *Alabama*, 380 U. S. 415, 421–422 (1965)).

24.10, were first raised more than two and a half years after Lee's trial. The two Rules, Missouri maintains, "work together to enhance the reliability of a *trial court's* determination of whether to delay a scheduled criminal trial due to the absence of a witness." Brief for Respondent 29 (footnote omitted) (emphasis added). Nevertheless, neither the prosecutor nor the trial judge so much as mentioned the Rules as a reason for denying Lee's continuance motion.[10] If either prosecutor or judge considered supplementation of Lee's motion necessary, they likely would have alerted the defense at the appropriate time, and Lee would have had an opportunity to perfect his plea to hold the case over until the next day. Rule 24.10, we note, after listing the components of a continuance motion, contemplates subsequent perfection: "If the court shall be of the opinion that the affidavit is insufficient it shall permit it to be amended."

The State, once content that the continuance motion was ripe for trial court disposition on the merits, had a second thought on appeal. It raised Rule 24.10 as a new argument in its brief to the Missouri Court of Appeals; even then, the State did not object to the motion's oral form. App. 107–108, 110–115. The Missouri Court of Appeals, it seems, raised Rule 24.09's writing requirements ("a written motion accompanied by [an] affidavit") on its own motion.[11]

Three considerations, in combination, lead us to con-

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[10] By contrast, the judge specifically directed Lee's counsel to supplement counsel's oral motion for judgment of acquittal with a written motion. See *supra*, at 6–7.

[11] The belated assertion of these Rules also explains why Lee did not contend in his state postconviction motion that counsel was constitutionally ineffective for failing meticulously to comply with Rules 24.09 and 24.10. That postconviction motion had been made and denied in the trial court before the Rules' entry into the case when Lee proceeded on appeal. See *supra*, at 7, n. 3.

clude that this case falls within the small category of cases in which asserted state grounds are inadequate to block adjudication of a federal claim. First, when the trial judge denied Lee's motion, he stated a reason that could not have been countered by a perfect motion for continuance. The judge said he could not carry the trial over until the next day because he had to be with his daughter in the hospital; the judge further informed counsel that another scheduled trial prevented him from concluding Lee's case on the following business day. Although the judge hypothesized that the witnesses had "abandoned" Lee, *id.,* at 22, he had not "a scintilla of evidence or a shred of information" on which to base this supposition, 213 F. 3d, at 1040 (Bennett, C. J., dissenting).[12]

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[12] The dissent suggests that Lee's counsel decided not to put on the alibi defense promised in his opening statement because the prosecution's witnesses caused that planned defense to "collaps[e] altogether." See *post*, at 16. The record refutes that suggestion. Lee's counsel knew *before* he promised an alibi defense in his opening that the State planned to rebut it: The prosecutor's opening statement—given prior to defense counsel's—outlined the rebuttal witnesses' expected testimony. Tr. 178–187. Likewise, the prosecutor's statement that she "had in reserve other witnesses prepared to rebut the alibi testimony," *post*, at 17, was part of her opening statement, see Tr. 187. Furthermore, the alibi witnesses would have known of Lee's sentence in an unrelated case—a fact that the dissent suggests gave them "second thoughts" about testifying, *post*, at 16—a month before they traveled to Missouri. Tr. 25–26.

Utterly confounding are the dissent's depictions of "the realities of trial," *post*, at 13, capped by the statement that "[b]efore 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," *post*, at 17. Rule 24.10, the dissent insists, if meticulously observed, would have produced the very thing the court "needed to grant the motion: an assurance that the defense witnesses were still prepared to offer material testimony." *Post*, at 13; see *post*, at 17. No motion in the immediacy of the witnesses' sudden disappearance, however, could

Second, no published Missouri decision directs flawless compliance with Rules 24.09 and 24.10 in the unique circumstances this case presents—the sudden, unanticipated, and at the time unexplained disappearance of critical, subpoenaed witnesses on what became the trial's last day.[13] Lee's predicament, from all that appears, was one Missouri courts had not confronted before. "[A]lthough [the rules themselves] may not [have been] novel, . . . [their] application to the facts here was." *Sullivan* v. *Little Hunting Park, Inc.,* 396 U. S. 229, 245 (1969) (Harlan, J., dissenting).

Third and most important, given "the realities of trial," *post*, at 13, Lee substantially complied with Missouri's key Rule. As to the "written motion" requirement, Missouri's

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have provided assurance that they were still prepared to offer material testimony. The "careful trial judge" does not demand the impossible. The witnesses' absence was unexplained, and could not be explained on the afternoon of their disappearance. That is why an overnight continuance to locate the witnesses was so "very valuable to [Lee's] case." See *supra*, at 6.

[13] Missouri cites five cases as examples of the state courts' enforcement of Rules 24.09 and 24.10 (or their predecessors) "even in cases of exigency." Brief for Respondent 25–26. The five cases are: *State* v. *Gadwood*, 342 Mo. 466, 479, 116 S. W. 2d 42, 49 (1937) (defendant's counsel knew, or should have known, of likelihood of witnesses' inability to appear two days before trial); *State* v. *Cuckovich*, 485 S. W. 2d 16, 21 (Mo. 1972) (en banc) (defendant arrived at court on first day of trial with a letter from a doctor explaining that witness was ill); *State* v. *Scott*, 487 S. W. 2d 528, 530 (Mo. 1972) (absent witness was not subpoenaed); *State* v. *Settle*, 670 S. W. 2d 7, 13–14 (Mo. App. 1984) (deficient application filed six days before trial); *State* v. *Freeman*, 702 S. W. 2d 869, 874 (Mo. App. 1985) (absent witness had told officer serving subpoena that she would not appear). All of these cases are readily distinguishable; none involved the sudden and unexplained disappearance of a subpoenaed witness in the midst of trial. The adequacy of a state ground, of course, does not depend on an appellate decision applying general rules to the precise facts of the case at bar. But here, no prior decision suggests strict application to a situation such as Lee's.

brief in this Court asserted: "Nothing would have prevented counsel from drafting a brief motion and affidavit complying with Rul[e] 24.09 in longhand while seated in the courtroom." Brief for Respondent 30.[14] At oral argument, however, Missouri's counsel edged away from this position. Counsel stated: "I'm not going to stand on the formality . . . of a writing or even the formality of an affidavit." Tr. of Oral Arg. 48. This concession was well advised. Missouri does not rule out oral continuance motions; they are expressly authorized, upon consent of the adverse party, by Rule 24.09. And the written transcript of the brief trial court proceedings, see *supra*, at 3, enabled an appellate court to comprehend the situation quickly. In sum, we are drawn to the conclusion reached by the Eighth Circuit dissenter: "[A]ny seasoned trial lawyer would agree" that insistence on a written continuance application, supported by an affidavit, "in the midst of trial upon the discovery that subpoenaed witnesses are suddenly absent, would be so bizarre as to inject an Alice-in-Wonderland quality into the proceedings." 213 F. 3d, at 1047.

Regarding Rule 24.10, the only Rule raised on appeal by the prosecution, see *supra*, at 8–9, the Missouri Court of Appeals' decision was summary. Although that court did not specify the particular components of the Rule neglected by Lee, the State here stresses two: "Lee's counsel never mentioned during his oral motion for continuance the testimony he expected the missing witnesses to give"; further, he "gave the trial court no reason to believe that the missing witnesses could be located within a reasonable time." Brief for Respondent 31.

These matters, however, were either covered by the oral

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[14] Missouri's brief did not address the requirement that the affidavit be notarized.

continuance motion or otherwise conspicuously apparent on the record. The testimony that the alibi witnesses were expected to give had been previewed during *voir dire* at the outset of the three-day trial, then detailed in defense counsel's opening statement delivered just one day before the continuance motion. App. 10–13; see *Osborne*, 495 U. S., at 123 (defense counsel's failure to object to jury charge did not bar consideration of federal claim where counsel had pressed the basic objection in a motion to dismiss made immediately before "brief" trial). Two of the prosecution's witnesses testified in part to anticipate and rebut the alibi. Tr. 443–487. An alibi instruction was apparently taken up at the charge conference held less than an hour before the trial court denied the continuance motion. See *supra*, at 5, n. 1. When defense counsel moved for a continuance, the judge asked a question indicating his recognition that alibi witness Gladys Edwards was Lee's mother. See *supra*, at 6, n. 2.

Given the repeated references to the anticipated alibi witness testimony each day of trial, it is inconceivable that anyone in the courtroom harbored a doubt about what the witnesses had traveled from California to Missouri to say on the stand or why their testimony was material, indeed indispensable, to the defense. It was also evident that no witness then in the Kansas City vicinity could effectively substitute for the family members with whom Lee allegedly stayed in Ventura, California. See Rule 24.10(a) and (c) (movant shall show "the materiality of the evidence sought," "[w]hat particular facts the affiant believes the witness will prove," and that "no other person" available to the movant could "so fully prove the same facts").

Moreover, Lee showed "reasonable grounds for belief" that the continuance would serve its purpose. See Rule 24.10(b). He said he knew the witnesses had not left Kansas City because they were to "ministe[r]" there the next two evenings; he provided their local address; and he

sought less than a day's continuance to enforce the subpoenas for their attendance. App. 16–18.

Concerning his "diligence . . . to obtain" the alibi testimony, see Rule 24.10(a), Lee and his counsel showed: the witnesses had voluntarily traveled from California to appear at the trial; counsel had subpoenaed the witnesses when he interviewed them in Kansas City; the witnesses had telephoned counsel the evening before the third trial day and had agreed to come to court that next day; the witnesses in fact were in court at 8:30 in the morning waiting in a witness room; and Lee saw them during a recess. App. 16–18. Countering "procurement" of the witnesses' absence by the defense, see Rule 24.10(d), Lee affirmed that he did not know "why they left" or "where they went," and asked for just "a couple hours' continuance [to] try to locate them." App. 17–18.

Rule 24.10, like other state and federal rules of its genre, serves a governmental interest of undoubted legitimacy. It is designed to arm trial judges with the information needed to rule reliably on a motion to delay a scheduled criminal trial. The Rule's essential requirements, however, were substantially met in this case. Few transcript pages need be read to reveal the information called for by Rule 24.10. "[N]othing would [have] be[en] gained by requiring" Lee's counsel to recapitulate in (a), (b), (c), (d) order the showings the Rule requires. See *Osborne*, 495 U. S., at 124; cf. *Staub* v. *City of Baxley,* 355 U. S. 313, 319–320 (1958) (failure to challenge "specific sections" of an ordinance not an adequate state ground barring review of federal claim when party challenged constitutionality of entire ordinance and all sections were "interdependent"). "Where it is inescapable that the defendant sought to invoke the substance of his federal right, the asserted state-law defect in form must be more

evident than it is here." *James* v. *Kentucky,* 466 U. S., at 351.[15]

The dissent critiques at great length *Henry* v. *Mississippi,* 379 U. S. 443 (1965), a case on which we do not rely in reaching our decision.[16] See *post*, at 6–9, 20. This protracted exercise is a prime example of the dissent's vigorous attack on an imaginary opinion that bears scant, if any, resemblance to the actual decision rendered today. We chart no new course. We merely apply *Osborne*'s sound reasoning and limited holding to the circumstances of this case. If the dissent's shrill prediction that today's decision will disrupt our federal system were accurate, we would have seen clear signals of such disruption in the

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[15] The dissent, indulging in hyperbole, describes our narrow opinion as a "comb" and "searc[h]" order to lower courts. *Post*, at 9. We hold, simply and only, that *Lee* satisfied Rule 24.10's essential elements. Just as in *Osborne*, see *supra*, at 14–15, we place no burden *on courts* to rummage through a ponderous trial transcript in search of an excuse for a defense counsel's lapse. The dissent, in this and much else, tilts at a windmill of its own invention.

[16] *Henry* has been called "radical," *post*, at 7 (quoting R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 584 (4th ed. 1996)), not for pursuing an "as applied" approach, as the dissent states, but for suggesting that the failure to comply with an anterior procedure was cured by compliance with some subsequent procedure. See *id.,* at 584–585. In *Henry*, the Court indicated that although there was no contemporaneous objection at trial to the admission of evidence alleged to have been derived from an unconstitutional search, a directed verdict motion made at the end of the prosecution's case was an adequate substitute. 379 U. S., at 448–449. Nothing of the sort is involved in this case. Lee is not endeavoring to designate some later motion, *e.g.*, one for a new trial, as an adequate substitute for a continuance motion. The question here is whether the movant must enunciate again, when making the right motion at the right time, supporting statements plainly and repeatedly made the days before. See *supra*, at 3–5. On whether such repetition serves a legitimate state interest, *Osborne*, not *Henry*, controls.

eleven years since *Osborne*. The absence of even dim distress signals demonstrates both the tight contours of *Osborne* and the groundlessness of the dissent's frantic forecast of doom. See *United States* v. *Travers*, 514 F. 2d 1171, 1174 (CA2 1974) (Friendly, J.) ("Cassandra-like predictions in dissent are not a sure guide to the breadth of the majority's ruling").

It may be questioned, moreover, whether the dissent, put to the test, would fully embrace the unyielding theory that it is never appropriate to evaluate the state interest in a procedural rule against the circumstances of a particular case. See *post*, at 6–9. If that theory holds, it would matter not at all why the witnesses left. Even if the evidence would show beyond doubt that the witnesses left because a court functionary told them to go, saying their testimony would not be needed until the next day, see *supra*, at 10, n. 6, Lee would lose under the dissent's approach. And that result would be unaffected should it turn out that the functionary acted on the instigation of a prosecutor who knew the judge would be at the hospital with his daughter the next day. See *supra*, at 6. The particular application, never mind how egregious, would be ignored so long as the Rule, like the mine run of procedural rules, generally serves a legitimate state interest.

To summarize, there was in this case no reference whatever in the trial court to Rules 24.09 and 24.10, the purported procedural impediments the Missouri Court of Appeals later pressed. Nor is there any indication that formally perfect compliance with the Rules would have changed the trial court's decision. Furthermore, no published Missouri decision demands unmodified application of the Rules in the urgent situation Lee's case presented. Finally, the purpose of the Rules was served by Lee's submissions both immediately before and at the short trial. Under the special circumstances so combined, we conclude that no adequate state-law ground hinders con-

sideration of Lee's federal claim.[17]

Because both the District Court and the Court of Appeals held Lee's due process claim procedurally barred, neither court addressed it on the merits. We remand the case for that purpose. See *National Collegiate Athletic Assn.* v. *Smith,* 525 U. S. 459, 470 (1999) (We ordinarily "do not decide in the first instance issues not decided below.").

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For the reasons stated, the judgment of the United States Court of Appeals for the Eighth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[17] In view of this disposition, we do not reach further questions raised by Lee, *i.e.*, whether he has shown "cause" and "prejudice" to excuse any default, *Wainwright* v. *Sykes,* 433 U. S. 72, 90–91 (1977), or has made sufficient showing of "actual innocence" under *Schlup* v. *Delo,* 513 U. S. 298, 315 (1995), to warrant a hearing of the kind ordered in that case.