No. 25-5253

In The

Supreme Court of the United States

STEVEN TUOPEH,

Petitioner

v.

STATE OF SOUTH DAKOTA,

Respondent

On Petition For A Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent reframes Petitioner's questions as follows:

I. Whether Tuopeh's compulsory process rights required correctional officers to physically force an unwilling inmate witness into court when all parties agreed the witness would refuse to testify?

II. Whether the trial court violated Tuopeh's right to present a complete defense by excluding double hearsay offered to attack the State's investigation and charging decisions?

III. Whether a prosecutor's statement during rebuttal closing constituted improper vouching?

IV. Whether the South Dakota Supreme Court's reference to the jury's role as determining "guilt or innocence" rather than "guilty or not guilty" deprived Tuopeh of due process?

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The South Dakota Supreme Court's decision in *State v. Tuopeh*, 2025 S.D. 16, 19 N.W.3d 37, is reproduced in the appendix to Tuopeh's petition.

STATEMENT OF THE CASE

This case stems from a homicide involving five central figures. Steven Tuopeh and Jeff Pour brutally beat Christopher Mousseaux so severely that Mousseaux died from his injuries. Korderro Robinson, a fellow inmate, was housed in the same jail block as Tuopeh and Pour for several months. And Detective Patrick Marino led the investigation.

There is no dispute about who carried out the crime. Surveillance video from a pub and gas station captured the beating and showed both Tuopeh and Pour inflicted blows to Mousseaux's head. What the footage did not show clearly was whether Tuopeh and Pour used brass knuckles or sharp rings during the attack. Both men denied having anything on their hands. Tuopeh presses this point because, though Mousseaux suffered widespread blunt-force injuries, the medical examiner determined the cause of death was a traumatic brain injury inflicted by a blunt force object to the skull.

The State first charged Tuopeh and Pour as co-defendants. Pour cut a deal, so the cases were severed. That left Tuopeh to stand trial on charges of second-

degree murder and first-degree manslaughter. By the second day of trial, the State was ready to rest.

Tuopeh planned to present a defense. He wanted the jury to hear from Robinson who claimed that Pour had once admitted using brass knuckles in the assault. Robinson's story surfaced while he was in jail awaiting sentencing on another crime. He offered it to the State in hopes of leniency, and Detective Marino followed up with him. Tuopeh subpoenaed Robinson, and the court permitted it. But when correctional officers came to retrieve Robinson, he refused to leave his cell. He also refused transport to court, making clear he would not testify.

During a hearing outside the jury's presence, Tuopeh's lawyer confirmed Robinson wouldn't come. The court suggested three times that Tuopeh could issue another subpoena in case Robinson changed his mind. But Tuopeh did not do so. Everyone agreed Robinson was refusing to testify and would not relent. Tuopeh never asked the court to drag Robinson to the courtroom. On the eve of closing arguments, he floated the idea of postponing trial for up to a week, hoping Robinson might change his mind. But Tuopeh never formally sought a continuance. So the trial court treated Robinson as an unavailable witness.

Still, Tuopeh wanted Robinson's account before the jury. He asked to admit Detective Marino's testimony about what Robinson said Pour had told him. The court gave Tuopeh the chance to argue such testimony would fit under the hearsay exceptions. He said the statement qualified either as a party-opponent admission or as a statement against interest with sufficient guarantees of trustworthiness.

The court disagreed. Pour, it reasoned, was not Tuopeh's party opponent. And Robinson's credibility problems loomed large: he dangled the story to get leniency, had a history of dishonest crimes, and gave his statement outside oath, cross-examination, or penalty of perjury. The court concluded the double hearsay was inadmissible under SDCL 19-19-804, which tracks Federal Rule of Evidence 804.

During closing, Tuopeh's counsel pointed out that his sneakers had no blood on them, stressing "there's no evidence, whatsoever, that the sneakers were cleaned. None. But they try to sell you with that anyway." The prosecutor shot back: "the defense just said to you that I was trying to sell you something. That's not my job. I'm not a salesman. My job is justice and bringing people to justice who have committed crimes." Tuopeh objected, claiming improper vouching, but the court overruled.

The jury convicted Tuopeh on both counts, but the court entered judgment on second-degree murder alone and sentenced him to life, the mandatory minimum.

On appeal, Tuopeh pressed several issues, three of which matter here. First, he argued for the first time that the trial court should have physically forced Robinson into court. The South Dakota Supreme Court disagreed. Tuopeh had subpoenaed Robinson, the court let him try again if Robinson relented, and Tuopeh never sought to compel his appearance or to continue the trial. Robinson was properly deemed unavailable. *Tuopeh*, 2025 S.D. 16, ¶ 28.

Second, Tuopeh challenged the exclusion of Robinson's supposed statement through Detective Marino. The high court affirmed, calling it double hearsay,

rejecting the idea that Pour was a party opponent, and finding Robinson's statement untrustworthy under the exceptions. It also noted that putting the State's investigation on trial would distract from the real issue: Tuopeh's "guilt or innocence." *Tuopeh*, 2025 S.D. 16, ¶¶ 30-33.

Third, Tuopeh argued prosecutorial misconduct, pointing to the "my job is justice" remark. The court said the prosecutor was only responding to Tuopeh's salesman jab. The comment did not vouch for any witness, evidence, or legal conclusion. *Tuopeh*, 2025 S.D. 16, ¶ 38.

After losing, Tuopeh sought rehearing. This time he reframed old arguments. He claimed Robinson should have been compelled to appear. He said his offhand suggestion about delaying trial counted as a motion to continue. He invoked *Kyles v. Whitley*, 514 U.S. 419 (1995), for the first time, to support his attempt at attacking the State's investigation. And he objected to the court's handling of the prosecutor's statement, misquoting it as "I am justice." Finally, he took issue with the state supreme court's phrase "guilt or innocence," which he thought shifted the burden of proof. The court denied rehearing.

And that brings us here.

REASONS FOR DENYING THE PETITION

This case presents no compelling reason for review. There is no conflict among federal circuits or state supreme courts. There is no novel or recurring

federal question. And the decisions below rest on fact-bound, case-specific applications of settled law.

Though he relies extensively on *Washington v. Texas*, 388 U.S. 14 (1967), Tuopeh's main contention is not that some state law barred an entire category of persons from testifying. Rather, he merely disagrees with the court's evidentiary rulings. In the same vein, he leans heavily on *Kyles*, 514 U.S. 419, to suggest he had a constitutional right to admit double hearsay to challenge the State's investigation and charging decisions. But *Kyles* says no such thing. His grievance about an improper application of *United States v. Young*, 470 U.S. 1 (1985), was forfeited when he failed to cite the case at all in his opening appellate brief. And his complaint about the word "innocence" raises no constitutional concern. This case was built on strongly-rooted evidentiary rulings based on valid evidentiary rules, all of which were applied below in line with this Court's authority.

I. Correctional officers were not required to physically force an unwilling inmate witness into court to satisfy Tuopeh's compulsory process rights when all parties agreed the witness would refuse to testify.

The Sixth Amendment's Compulsory Process Clause guarantees that a defendant has the right to compel the attendance of witnesses and present testimony in their defense. This right is fundamental to the adversarial system and the pursuit of justice because it allows the defendant to present a complete defense. But the right is not unlimited. It must be balanced against other legitimate interests. It does not override valid evidentiary rules. And a witness's testimony must be relevant and material to the defense.

Tuopeh complains that the South Dakota Supreme Court did not cite *Washington*, 388 U.S. 14, in its published opinion. But *Washington* does not help him. In *Washington*, the issue was that "[t]he testimony of [a co-defendant] was denied to the defense not because the State refused to compel his attendance, but because a state statute made his testimony inadmissible whether he was present in the courtroom or not." *Washington*, 388 U.S. at 19. This is not the same issue Tuopeh raises here. His complaint is that the court did not do enough to compel Robinson's presence in court. There was no categorical bar but rather a narrow, fact-specific evidentiary ruling.

The South Dakota Supreme Court spelled out the distinction: "[t]he circuit court here did issue a subpoena that was served on Robinson on April 6, 2023." *Tuopeh*, 2025 S.D. 16, ¶ 27. When Robinson refused to leave his prison cell to testify in court, his refusal was conveyed to the trial court on the second day of a three-day trial. *Id.* ¶ 28. The court invited "Tuopeh to again subpoena Robinson and allow his testimony if Robinson changed his mind before the close of trial." *Id.* But Tuopeh chose not to. *Id.* As the state high court summarized, "it is clear from the record that both parties and the court believed that Robinson was simply unwilling to testify and would not change his mind." *Id.* ¶ 28 at n. 13.

Tuopeh did not ask the trial court to order officers to physically force Robinson from his cell. Rather, on the same day closing arguments were expected to begin, Tuopeh informally suggested the trial court consider postponing trial until a theoretical day when Robinson might be ready to testify, including up to a week

away. But he made no formal request to obtain a continuance for his absent witness. Doing so would have required him to meet three criteria, including that the proposed testimony was material to the issue and that it was reasonably certain the witness's testimony would be procured by the time to which the trial would be postponed. *Tuopeh*, 2025 S.D. 16, ¶ 28 at n. 14. As the state supreme court noted, Tuopeh did not even attempt to do so, nor was there any indication he would be able to meet those prongs. *Id*. The trial court had ruled the proposed testimony was not relevant, would create trials within the trial, and there was no indication Robinson would change his mind. When the proffered testimony is irrelevant, no constitutional concern is implicated. *United States v. De Stefano*, 476 F.2d 324, 329 (7th Cir. 1973); *State v. Dale*, 439 N.W.2d 98, 104 (S.D. 1989).

Tuopeh dropped the issue at the trial court level. He agreed at trial that his proposed witness refused to leave his cell to testify, yet now he claims, belatedly, that correctional officers should have forcibly dragged a recalcitrant inmate into court—a request he did not make at the time. *Tuopeh*, 2025 S.D. 16, ¶ 28 at n. 13. No court—and particularly not this Court—has required the State or trial courts to do so. The Sixth Amendment does not require that a witness take the stand after refusing to testify. *United States v. Griffin*, 66 F.3d 68, 70 (5th Cir. 1995). After all, a subpoena compels appearance, but enforcement is through contempt powers, not brute force. *Blair v. United States*, 250 U.S. 273, 278 (1919). And when an inmate-witness refuses to comply, assuming he raises no valid privilege, he is deemed unavailable under Rule 804.

South Dakota courts, when analyzing witness unavailability, require a genuine good-faith effort to procure the witness, consistent with federal interpretation. *State v. Davis*, 293 N.W.2d 885, 887 (S.D. 1980) (citing *Barber v. Page*, 390 U.S. 719, 725 (1968)). And, as in federal courts, "[w]hether due diligence has been shown is a factual question to be determined according to the circumstances of each case." *Davis*, 293 N.W.2d at 888. Good faith efforts to procure Robinson's testimony were made for Tuopeh. The trial court issued a subpoena as requested and verified it had been properly served on Robinson. But "both parties and the court believed that Robinson was simply unwilling to testify and would not change his mind." *Tuopeh*, 2025 S.D. 16, ¶ 28 at n. 13. When the trial court invited Tuopeh to try another subpoena, he did not do so. Robinson's unavailability was due in no part to the State or the court's alleged lack of diligence.

In *Washington*, the defendant was up against a broad sweeping "rule generally disqualifying [inmate] defense witnesses." *Washington*, 388 U.S. at 20. Not so here. This is not a case where "the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Washington*, 388 U.S. at 23. Instead, the trial court properly found Robinson to be an unavailable witness and Tuopeh chose not to pursue the compulsory process further, Instead, he attempted to get Robinson's statement admitted under the exceptions to double hearsay.

II. The trial court properly excluded unreliable double hearsay statements offered to attack the State's investigation and charging decisions.

Tuopeh's trial court ruled Robinson was an unavailable witness. *See* SDCL 19-19-804(a)(2) (stating that a witness is unavailable when they refuse to testify about the subject matter despite a court order to do so). So Tuopeh asked the court to admit hearsay within hearsay—Detective Marino's testimony about what Robinson told him that Pour said while they were in the same jail block together. Tuopeh wanted to highlight details of how Detective Marino pursued the investigation, such as how long it took law enforcement to investigate Robinson's statements and the State's decision to drop the charge of first-degree manslaughter with a dangerous weapon before trial. But the trial court's evidentiary rulings—that the testimony was irrelevant and did not fit a hearsay exception—turned on reliability, relevance, and the court's management of its courtroom. They did not sidestep Tuopeh's Fourteenth Amendment rights.

Tuopeh relies on *Kyles*, 514 U.S. 419, to argue his right to present a defense was hindered when he was not permitted to admit the double hearsay to challenge the State's investigation and charging decisions. He thinks that introducing Pour's statement through Detective Marino's testimony about what Robinson heard should have inspired law enforcement to investigate further. But Tuopeh stretches his argument past the breaking point. *Kyles* is a habeas case involving undisclosed *Brady* material. And the *Kyles* Court emphasized fairness in trial through

disclosure of material evidence—not oversight of investigative moves or prosecutorial discretion. *Kyles*, 514 U.S. at 454. A defendant's attempt to attack an allegedly sloppy investigation is a matter of evidentiary discretion, not a Fourteenth Amendment due process right.

South Dakota courts have both the discretion and the obligation to determine whether hearsay statements contain the necessary circumstantial "guarantees of trustworthiness" to be admissible—a duty this Court set out. *Idaho v. Wright*, 497 U.S. 805, 817 (1990); *State v. Engesser*, 2003 S.D. 47, ¶ 38, 661 N.W.2d 739, 751. In Tuopeh's case, the trial court's fact-specific evidentiary rulings were sound. South Dakota courts apply a seven-factor test when determining whether hearsay is trustworthy. *Tuopeh*, 2025 S.D. 16, ¶ 32. South Dakota's test is in line with this Court's application of a case-by-case, totality of the circumstances analysis for hearsay admissibility when trustworthiness is at issue. *Idaho*, 497 U.S. at 819. The state high court found the trial court correctly applied the seven-factor test in Tuopeh's case. *Tuopeh*, 2025 S.D. 16, ¶ 32. The trial court ruled that the proposed hearsay within hearsay was not admissible under SDCL 19-19-804 (patterned nearly verbatim after Federal Rule of Evidence 804) for several reasons:

- Pour was not a party opponent;
- Robinson had a history of recurrent crimes of dishonesty, all creating negative indicators for credibility;
- Robinson's statement was not made under oath, wasn't subject to cross-examination, and wasn't subject to the penalty for perjury;

- Robinson had no known relationship to either Tuopeh or Pour other than being at the jail at overlapping time periods; and
- Robinson tried to use his willingness to give this testimony to "obtain better treatment for himself" thus giving him "motive to manufacture his statements."

Tuopeh, 2025 S.D. 16, ¶¶ 31-33. The court's bases were thorough and proper based on the specific facts of Tuopeh's case.

Kyles did not create a constitutional right for defendants to challenge the quality of the State's investigation or its charging decisions. In fact, *Kyles* and several other cases reiterate that a defendant does *not* have a constitutional right to a perfect investigation. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (finding no constitutional violation when law enforcement's actions "can at worst be described as negligent"); *Moore v. Illinois*, 408 U.S. 786, 795 (1972) (holding "[w]e know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case"). At bottom, the trial court's evidentiary rulings were properly applied within its discretion and in line with this Court's precedent.

III. The prosecutor's statement during rebuttal closing—responding to defense accusations of "selling" the case—did not constitute improper vouching.

Courts allow "invited responses" when rebutting defense accusations. This Court said as much in *Young*, 470 U.S. at 11 (relying on the "invited response" or "invited reply" rule created in *Lawn v. United States*, 355 U.S. 339 (1958)). The

court below said just that when it rejected Tuopeh's claim of prosecutorial misconduct: "[t]he 'my job is justice' comment, in context, was not an attempt to vouch for the credibility of a particular legal conclusion, but rather a description of the proper role of a prosecutor *made in response to a defense argument*." *Tuopeh*, 2025 S.D. 16, ¶ 38 (emphasis added).

Now, Tuopeh asks this Court to believe a host of alleged errors by the lower court regarding *Young*: that the court did not examine whether the response went out of bounds per *Young*; erred by not performing the *Young* analysis in full; decided no error occurred because the "justice" comment did not refer to a specific witness; needlessly limited the scope of *Young* to merely witness statements; and committed prejudicial error of Constitutional proportions through its unreasonable ignorance of *Young*. *Petitioner's Brief* pp. 25-28.

One essential fact disposes of this argument: Tuopeh never raised a *Young* claim at the trial court level—he merely objected that the prosecutor was vouching for a witness. What's more, Tuopeh also did not mention *Young* in his opening appellate brief before the South Dakota Supreme Court. He did not bring it up until his reply brief. In South Dakota, a reply brief "must be confined to new matter raised in the brief of the appellee"—an appellant cannot raise new arguments or authority in its reply. SDCL 15-26A-62. *See also Agee v. Agee*, 1996 S.D. 85, 551 N.W.2d 804, 807 (holding a "party may not raise an issue for the first time on appeal, especially in a reply brief when the other party does not have the opportunity to answer") (citations omitted). So not only is this complaint forfeited,

but to argue the courts unreasonably ignored *Young* is an unfair characterization because he did not timely bring it to their attention.

Further, the prosecutor in *Young* said the defendant in that case was guilty and the jury would not be doing its job if it acquitted him. *Young*, 470 U.S. at 6. The prosecutor's statement here didn't go nearly as far. As both lower courts found, the statement in Tuopeh's trial was simply a retort to the defense's accusation that the State was selling something. *Tuopeh*, 2025 S.D. 16, ¶ 38. It did not taint the trial.

Finally, Tuopeh's claim that the state supreme court only analyzes vouching claims when they relate to a specific person or witness is plainly incorrect. This Court need look no further than the *Tuopeh* opinion itself. The opinion analyzed not only whether the prosecutor vouched for a specific person, but also whether she possibly vouched for evidence or legal conclusions. It said "[t]he State made no statements as to the strength or credibility of *any witness or evidence*, but rather focused on rejecting Tuopeh's accusation. The 'my job is justice' comment, in context, was not an attempt to vouch for the credibility of a *particular legal conclusion*, but rather a description of the proper role of a prosecutor made in response to a defense argument." *Tuopeh*, 2025 S.D. 16, ¶ 38 (emphasis added). In the end, the prosecutor's statement here was a context-specific response consistent with this Court's precedent. The South Dakota Supreme Court's analysis aligns directly with the holding in *Young*.

IV. The South Dakota Supreme Court's reference to the jury's role as determining "guilt or innocence" rather than "guilty or not guilty" did not deprive Tuopeh of due process.

Though Tuopeh paints his final issue as a detrimental stain on his due process right and the entire appellate review of his case, the single word he complains about in the South Dakota Supreme Court opinion was innocuous. The opinion says, "putting the investigation on trial would distract from the central issue before the jury: Tuopeh's guilt or innocence." *Tuopeh*, 2025 S.D. 16, ¶ 30. Tuopeh argues the court should have clarified the question was, instead, the determination of whether Tuopeh was guilty or not guilty of the offense charged.

This parsing of one word does not reflect a heightened legal standard Tuopeh faced at the trial level. When reviewing the issue of Robinson's unavailability to testify, the trial court correctly applied the standard Tuopeh advocates for. It said the jury's "job and the verdict questions that will be submitted to them is whether Mr. Tuopeh *is guilty or not*." It repeated that what the jury is concerned about is whether "Tuopeh *is guilty or not*." And the jury was instructed as such. Before trial, the jury was instructed on its "duty to decide from the evidence what the facts are and whether a defendant *is guilty or not guilty* of the crimes charged." At the close of the case, the jury was instructed that an indictment does not create any inference of guilt; the defendant is presumed innocent; that the jury must be satisfied beyond a reasonable doubt that the defendant is guilty; that if there is a real possibility that defendant is not guilty, it must return a verdict of not guilty;

and that its duty is "to determine whether the defendant is guilty or not guilty of the offense charged."

At most, the word choice in Tuopeh's published opinion references a matter of state court phrasing in one written opinion. There is no due process concern here because the trial court used the legal standard of "guilty or not guilty," not an innocence standard. Tuopeh's complaint centers on one inmate and one sentence in one written opinion—not an improper standard rendering the appellate review of his or others' criminal trials faulty. Again, there is no federal issue warranting this Court's attention.

CONCLUSION

No issues warrant this Court's review of Tuopeh's case. There is no unconstitutional state law or action at play. There are no conflicts between courts. And the issues are narrow, fact-specific evidentiary rulings relevant to Tuopeh only—by nature, a poor vehicle for certiorari. The petition should be denied.

Dated this 29th day of September, 2025.

Respectfully submitted,

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