

No. _____

**In The
Supreme Court of the United States**

BJ McELVEEN,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Louisiana

PETITION FOR WRIT OF CERTIORARI

JANE C. HOGAN
Counsel of Record
HOGAN ATTORNEYS
310 N. CHERRY STREET
HAMMOND, LA 70401
TEL: (985) 542-7730
E-MAIL: JANE@HOGANATTORNEYS.COM

FEBRUARY 16, 2026

QUESTION PRESENTED

The only evidence supporting BJ McElveen’s convictions for two counts of armed robbery was the trial testimony of a DNA analyst who acted as a surrogate for the out-of-court conclusions of his absent colleagues. While Mr. McElveen’s case was pending on direct appeal, this Court ruled that a state may not introduce testimonial, out-of-court statements of a forensic analyst at trial “through a surrogate analyst who did not participate in their creation.” *Smith v. Arizona*, 602 U.S. 779, 803 (2024). The question presented is:

Whether, in light of this Court’s intervening decision in *Smith v. Arizona*, this Court should grant the petition, vacate the judgments below, and remand this matter for reconsideration?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the Petitioner is BJ McElveen, who was the defendant in the District Court and the appellant in the Louisiana Courts of Appeal. The Respondent is the State of Louisiana, through the District Attorney of the 19th Judicial District Court for East Baton Rouge Parish.

LIST OF PROCEEDINGS

Supreme Court of Louisiana

No. 2025-K-00563

State of Louisiana v. BJ McElveen

Published: 420 So.3d 1188 (La. 11/19/25)

Date of Opinion: November 19, 2025

Court of Appeal of Louisiana, First Circuit

No. 2023-KA-0939

State of Louisiana v. BJ McElveen

Published: 406 So.3d 429

Date of Opinion: December 30, 2024

Date Rehearing Denied: April 2, 2025

Nineteenth Judicial District Court, Parish of East Baton Rouge, Louisiana

No. 03-18-0487

State of Louisiana v. BJ McElveen

Published: Not published

Date of Ruling: September 30, 2023

TABLE OF CONTENTS

	Page
Question Presented.....	i
Parties to the Proceeding	ii
List of Proceedings.....	iii
Table of Contents	iv
Appendix Contents	v
Table of Authorities	vi
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provision.....	1
Introduction	2
Statement of the Case	3
Reasons for Granting the Petition.	11
1. In light of the intervening decision of <i>Smith v. Arizona</i> , the introduction of the DNA report and the surrogate analyst’s corresponding testimony violated BJ McElveen’s confrontation rights.	
Conclusion.....	22

APPENDIX CONTENTS

	Page
Appendix A: Louisiana Supreme Court’s Order Denying Discretionary Review (November 19, 2025)	1a
Appendix B: Louisiana First Circuit Court of Appeal, Denying Rehearing (April 2, 2025)	2a
Appendix C: Louisiana First Circuit Court of Appeal, Opinion Affirming Convictions (December 30, 2024)	3a
Appendix D: Excerpt of Transcript of Trial Proceedings, Trial Court Ruling the Surrogate DNA Analyst’s Testimony Inadmissible (September 28, 2022)	31a
Appendix E: Louisiana First Circuit Court of Appeal, Mid-Trial Writ Decision Permitting Surrogate Analyst Testimony (September 29, 2022)	75a
Appendix F: Excerpt of Transcript of Trial Proceedings, Testimony of Surrogate DNA Analyst (September 30, 2022)	76a
Appendix G: Louisiana State Police Crime Laboratory, Scientific Analysis Report, State’s Trial Exhibit 26 (August 6, 2018)	111a
Appendix H: Louisiana State Police Crime Laboratory, Scientific Analysis Report, State’s Trial Exhibit 26 (September 10, 2018)	113a

TABLE OF AUTHORITIES

Cases

<i>Bullcoming v. New Mexico</i> , 564 U.S. 647 (2011)	12
<i>Chapman v. California</i> , 386 U.S. 18 (1967).....	17, 18, 19, 21
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	12
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673 (1986)	18
<i>Smith v. Arizona</i> , 602 U.S. 779 (2024).....	3, 10, 11, 12, 13, 15, 16, 17
<i>State v. McElveen</i> , 420 So.3d 1188 (La. 11/19/25).	1
<i>State v. McElveen</i> , 406 So.3d 429 (La. App. 1 Cir. 12/30/24)	1
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993)	17
<i>United States v. Alvarado-Valdez</i> , 521 F.3d 337 (5th Cir. 2008).....	17, 18, 22
<i>United States v. Jackson</i> , 636 F.3d 687 (5th Cir. 2011).....	22
<i>Williams v. Illinois</i> , 567 U.S. 50 (2012)	8, 13

Constitutional Provisions

U.S. Const. amend. VI	1, 12
-----------------------------	-------

PETITION FOR WRIT OF CERTIORARI

Petitioner BJ McElveen respectfully petitions this Court to grant this petition, vacate his convictions, and remand to the Louisiana Supreme Court.

OPINIONS BELOW

The Louisiana Supreme Court's four-to-three decision (App., *infra*, 1a) to deny Mr. McElveen's writ is reported at *State v. McElveen*, 420 So.3d 1188 (La. 11/19/25). The two-to-one decision to affirm Mr. McElveen's convictions by the Louisiana First Circuit Court of Appeal (App., *infra*, 3a-30a) is reported at *State v. McElveen*, 406 So.3d 429 (La. App. 1 Cir. 12/30/24).

STATEMENT OF JURISDICTION

The Louisiana First Circuit Court of Appeal issued a final judgment affirming Mr. McElveen's convictions on April 2, 2025, when it denied a timely petition for rehearing. (App., *infra*, 2a). The Louisiana Supreme Court then denied discretionary review on November 19, 2025, by a four-to-three vote. (App., *infra*, 1a). This petition was timely filed on February 16, 2026. The Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in relevant

part: “In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.”

INTRODUCTION

On July 23, 2018, two masked intruders robbed a bank in Baton Rouge and fled across a field, dropping money, a glove, and a backpack as they ran. App., *infra*, 5a. These items were tested for DNA, and an analyst concluded that the strap and zippers of the backpack contained a mixed DNA profile of at least three contributors, from which BJ McElveen could not be excluded. *Id.* at 114a. Mr. McElveen’s DNA was not found on the glove, money, or the swabs taken from inside the backpack. *Id.*

At trial, the State did not call the analysts who performed the DNA testing to testify and instead attempted to introduce their conclusions through a representative of the Louisiana State Police Crime Lab who performed no testing, observed no testing being performed, and did not author the corresponding lab reports. The trial court held that the surrogate analyst’s testimony and the DNA reports were inadmissible, and the State sought an emergency mid-trial writ. The Louisiana First Circuit Court of Appeal reversed and held the testimony of an alternate crime lab employee who did not perform the actual testing did not violate Mr. McElveen’s confrontation rights and the DNA reports were admissible because they were not

testimonial. *Id.* at 75a. Following this ruling, the surrogate DNA analyst proceeded to testify as to the results generated by his non-testifying colleagues and the State admitted the corresponding DNA reports into evidence.

Mr. McElveen's convictions for armed robbery are based entirely on this evidence. While Mr. McElveen's case was pending on appeal, this Court held that the State may not introduce the testimonial out-of-court statements of a forensic analyst at trial through a surrogate analyst who did not participate in their creation. *Smith v. Arizona*, 602 U.S. 779, 802-03 (2024).

On December 30, 2024, the Louisiana First Circuit Court of Appeal affirmed Mr. McElveen's convictions, in a two-to-one opinion with one judge dissenting in light of *Smith*. App., *infra*, 30a. After a timely petition for rehearing was denied, the Louisiana Supreme Court denied discretionary review on November 19, 2025, by a narrow four-to-three vote. *Id.* at 1a.

In light of this Court's intervening decision of *Smith v. Arizona*, this Court should grant review and ultimately vacate the Louisiana Appellate Courts' decisions and remand for reconsideration.

STATEMENT OF THE CASE

On July 23, 2018, at about 9:00 a.m., officers of the Baton Rouge Police

Department (BRPD) and East Baton Rouge Parish Sheriff's Office (EBRPSO) were dispatched to a Capital One Bank to investigate an armed robbery. App., *infra*, 5a. Before the robbery, Erika Ellie-Jackson, the teller who opened the bank that day, entered and disarmed the building. Cornetta Washington, the other teller, waited in the parking lot until she received a signal from Ms. Jackson to enter. *Id.* As Ms. Washington entered, two masked men abruptly came inside and told her and Ms. Jackson to get on the floor. *Id.* One of the assailants pushed Ms. Washington down while the other dragged Ms. Jackson to the cash vaults. *Id.* As ordered at gunpoint, Ms. Jackson and Ms. Washington opened the cash vaults. *Id.* After taking over \$100,000, the assailants ran across the street and then through a field. *Id.* Ms. Jackson immediately pressed the alarm button and called 911. *Id.*

Deputies arrived at the scene, searched the field, and recovered a glove and a camouflage backpack used in the robbery which contained cash wrapped in Capital One wrappers and a loaded handgun. *Id.* Having developed no immediate leads, law enforcement received a Crime Stoppers tip that Baylon Trim committed the robbery with a man named "BJ."

On August 2, 2018, Mr. McElveen willingly turned himself in and submitted

to a DNA test. DNA analysts Tabitha Mizell and F. Nicole Proctor generated two DNA reports. The initial report is dated August 6, 2018, and describes the result of an examination completed on July 31, 2018. App., *infra*, 111a-112a. Of note, the report describes Exhibit 1A as a “DNA profile obtained from the swab taken from the straps, zipper, and zipper pulls of the backpack” used in the robbery. *Id.* at 111a. This profile consisted of a “mixture from more than three contributors, with a major mixture of two contributors.” *Id.* According to the report, the “DNA profile generated from Exhibit 1A was searched in the Combined DNA Index System (CODIS) as a one-time event and generated an investigative lead.” *Id.* at 112a.

Tabitha Mizell and F. Nicole Proctor released a supplemental DNA report on September 10, 2018, from an examination they conducted on August 29, 2018. *Id.* at 113a. According to this report, Mr. McElveen “cannot be excluded as a major contributor to the DNA profile obtained from the straps, zipper, and zipper pulls of the backpack.” *Id.* at 114a. The report further contained a statistical analysis that concluded it was 2.63 billion times more likely that Mr. McElveen’s DNA was contained in the mixture of Exhibit 1A, than of two random individuals. *Id.* at 115a.

On October 2, 2018, the State filed a bill of information that formally charged BJ McElveen with two counts of armed robbery, for robbing each of the bank tellers.

On September 26, 2022, Mr. McElveen's trial began. Mr. McElveen was not identified by the bank teller or any other witness and was not identifiable from the surveillance footage.

Lieutenant Chuck Foster testified that he was the case agent and sent the backpack and other items to the Crime Lab to be processed for DNA. ROA. 308.¹ Lieutenant Foster testified that the Crime Lab swabbed the backpack's zipper and straps and "were able to get an identification that led to Mr. McElveen." ROA. 311. Lieutenant Foster then obtained a warrant for Mr. McElveen's arrest and to take his DNA. ROA. 312. Mr. McElveen was in Texas at the time and willingly turned himself into the authorities. ROA. 312.

Detective Foster also testified that he received two Crime Stoppers tips pertaining to this case. The first was an alleged prank and the second tip was that Baylon Trim committed the robbery with a man named "BJ." ROA. 318, 324. Detective Foster did not reveal the source of the information, nor did the State call the informant to testify. However, Mr. Trim was never charged with the robbery

¹ All pertinent testimony was included in the Appendices. Other citations to the record on appeal are cited as "ROA." with the corresponding page number.

because his DNA was not found on any piece of recovered evidence. ROA. 318.

The State then called John Mai, a DNA technician at the Crime Lab, and the court called a bench conference and warned the State it could not elicit any testimony from Mr. Mai pertaining to the results of the DNA testing since he did not perform the analysis. ROA. 340. The court noted there was “ a lot of hearsay” in the DNA report and reiterated that Mr. Mai could only testify as to actions he performed. ROA. 340. Mr. Mai testified that the backpack was properly received in a manner consistent for scientific analysis and was swabbed for DNA according to protocols. ROA. 342.

The State then called DNA expert Zachary Shawhan to testify about the DNA results from the report. After identifying the report which described an examination conducted and signed by two different forensic scientists, the court excused the jury and held it would not permit the introduction of the report because Mr. Shawhan had not conducted the experiment, nor authored the report as either the analyst or the screener. App., *infra*, 41a. The State conceded that Mr. Shawhan had not performed the forensic analysis of the DNA and was only interpreting someone else’s work. *Id.* The court noted the analysis was performed by F. Nicole Proctor, and the State noted she “left the crime lab. She’s in Texas, Your Honor.” *Id.* at 43a.

After extensive argument, the court held that the Crime Lab report was inadmissible, and that Mr. Shawhan could not testify to any conclusions made by Ms. Proctor. The court then stated, “I would advise you probably need to find Ms. Proctor and get her on Zoom, because that’s the least this Court’s going to allow at this point, because I’m about to declare a mistrial.” *Id.* at 65a-66a. The defense then moved for a mistrial, which the court denied. *Id.* at 68a. The State sought an emergency writ to review the ruling, and the court eventually dismissed the jury for the day. *Id.* at 74a. The First Circuit stayed the trial and on September 29, 2022, granted the State’s writ and held: (1) the testimony of an alternate crime lab employee who did not perform the actual testing did not violate Mr. McElveen’s confrontation rights; and (2) the DNA reports were admissible because they were not testimonial pursuant to *Williams v. Illinois*, 567 U.S. 50 (2012); app., *infra*, 75a.

On September 30, 2022, trial resumed, and DNA Analyst Zachary Shawhan proceeded to testify, throughout 25 pages of the record, to the findings of the supplemental report. *Id.* at 85a-110a. Through Mr. Shawhan, the State introduced and published the DNA reports authored by Tabitha Mizell and F. Nicole Proctor. *Id.* at 87a. Mr. Shawhan’s testimony was clearly limited to reciting the conclusions and findings from the DNA report, as he admitted that his work in this case was only that

of a technical reviewer, and that he performed no testing, no observation of testing, and authored no report, as evident from the following exchange:

Counsel: Based on these reports that you have in front of you and the ones that you went through and the ones that somebody else prepared, can you say with any amount of certainty that whoever prepared the DNA material or collected it from the scene followed all of your protocols?

Shawhan: As an analyst for Louisiana State Police Crime Lab, I can really only testify to our results and our policies and procedures.

Counsel: What other interaction have you had in this case?

Shawhan: I'm simply a technical reviewer in this case, which means I evaluated the entire DNA analysis process and made sure it upheld our policies and procedures. That's the interaction I've had with this case.

App., *infra*, 106a.

Mr. Shawhan testified that a swab from the straps and zipper of the backpack produced a DNA profile that was “consistent with being a mixture of DNA from more than three contributors with a major mixture of two contributors.” *Id.* at 89a. Mr. Shawhan testified that on August 9, 2018, the lab received buccal swabs from Baylon Trim and BJ McElveen. *Id.* at 108a. After comparing the profiles, the lab concluded that Mr. McElveen could not be excluded as a major contributor to the mixed DNA profile obtained from the exterior backpack swab. *Id.* at 109a.

Following Mr. Shawhan's testimony, the State rested, the defense rested without calling any witnesses, and the jury found Mr. McElveen guilty as charged.

On February 2, 2023, the court denied Mr. McElveen's post-trial motions and immediately sentenced him to 25 years on each count to run concurrently, with an additional five consecutive years for having committed the robbery while armed with a firearm. ROA. 15-16.

Mr. McElveen timely appealed his convictions and sentences and urged seven assignments of error. On December 30, 2024, the First Circuit affirmed Mr. McElveen's convictions but vacated his sentences due to the trial court's failure to observe the mandatory sentencing delay. App., *infra*, 3a-29a. Notably, Chief Judge McClendon dissented and found that the admission of the DNA results through the testimony of a surrogate analysis was precluded under this Court's intervening decision of *Smith v. Arizona*, 602 U.S. 779, 783 (2024). App., *infra*, 30a.

On January 13, 2024, Mr. McElveen filed a timely petition for rehearing, which was denied on April 2, 2025. App., *infra*, 2a. Mr. McElveen then sought review in the Louisiana Supreme Court, which denied discretionary review on November 19, 2025, with three Justices voting to grant and docket the matter for briefing and oral argument. *Id.* at 1a.

REASONS FOR GRANTING THE PETITION

- 1. In light of *Smith v. Arizona*, the introduction of the DNA reports and the surrogate analyst’s corresponding testimony violated BJ McElveen’s confrontation rights.**

BJ McElveen’s armed robbery convictions rest exclusively on DNA results generated by unfronted forensic analysts. Rather than calling the analysts who actually performed the testing, the State introduced their testimonial conclusions through a surrogate representative from the Louisiana State Police Crime Lab, who admitted that he performed no testing, observed no testing, and did not author the report. By Mr. Shawhan’s own admission, he functioned “simply as a technical reviewer” whose role was limited to ensuring that the work of the absent analysts “upheld our policies and procedures.” App., *infra*, 106a. This type of surrogate testimony, which was offered to prove the truth of the out-of-court forensic conclusions, violates the Confrontation Clause. *See Smith v. Arizona*, 602 U.S. 779 (2024).

On appeal, Mr. McElveen argued the admission of the supplemental DNA report and Mr. Shawhan’s testimony violated Mr. McElveen’s right to confrontation. In a plurality opinion, the First Circuit committed factual error by finding that Mr. Shawhan was a “participant” in the DNA examination and therefore properly

testified about the DNA report's conclusion. The First Circuit also committed legal error by failing to properly apply *Smith v. Arizona*, as noted by the dissent, and applying the incorrect harmless error standard. For these reasons, Mr. McElveen's conviction must be vacated.

i. Relevant Law

The Sixth Amendment to the U.S. Constitution provides the defendant “[i]n all criminal prosecutions . . . shall enjoy the right . . . to be confronted with the witnesses against him.” This Court has identified a “core class of ‘testimonial’ statements” which equate to a witness who bears testimony against an accused. *Crawford v. Washington*, 541 U.S. 36, 51 (2004). Those statements include “*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits...[and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* (internal quotations and citations omitted).

In *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), this Court held that a forensic laboratory report certifying a defendant's blood-alcohol concentration was a testimonial statement which required the analyst who conducted the analysis or signed the report to testify subject to cross-examination. This Court specifically held

that “surrogate testimony” from a scientist “who did not sign the certification or perform or observe the test reported” violated an accused’s right to confront the analyst who made the certification. *Id.* at 652.

The following year, this Court issued a plurality opinion in *Williams v. Illinois*, 567 U.S. 50 (2012), and concluded that the introduction of a DNA profile created by Cellmark did not violate the Confrontation Clause because the purpose of the Cellmark report “was not to accuse petitioner or to create evidence for use at trial.” *Id.* at 84. When the Cellmark report was generated, the primary purpose was to “catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time.” *Id.*

While Mr. McElveen’s case was pending on direct review, this Court decided *Smith v. Arizona*, 602 U.S. 779, 783 (2024), and held that a testifying expert cannot restate the substance of someone else’s lab work as support for his own “independent opinion.” *Id.* at 798–99.

Under *Smith*, the DNA reports produced by Tabitha Mizell and F. Nicole Proctor were clearly inadmissible without subjecting those analysts to cross-examination. Mr. Shawhan’s surrogate testimony about the supplemental report’s

conclusions and Detective Foster's testimony about an initial presumptive lead generated by a non-testifying analyst, are equally inadmissible under *Smith*.

- ii. Mr. Shawhan did not participate in the DNA examination and therefore his testimony was that of a surrogate analyst, which must be evaluated in light of *Smith*.

In affirming Mr. McElveen's convictions, the appellate court committed factual error by finding that the introduction of the supplemental DNA report and Mr. Shawhan's testimony pertaining to its results were properly admitted because he was "a participant in the process." App., *infra*, 21a. This misconstrues Mr. Shawhan's role as a technical reviewer of the examinations performed by F. Nicole Proctor and Tabitha Mizell. When asked to describe his actions in this case, Mr. Shawhan testified that he "reviewed the entire case file" to determine that the analysts complied with established protocols. *Id.* at 69a. It is undisputed that Mr. Shawhan did not conduct any examination of Mr. McElveen's DNA or the backpack, and on cross-examination confirmed that as a "technical reviewer" he could only testify about the Crime Lab's policies and procedures, and the results generated by Ms. Proctor and Ms. Mizell. *Id.* at 106a.

John Mai, another Crime Lab employee, aptly described the work of a technical reviewer as someone who is not present when a test is performed who then later "can

look over...notes” to make sure someone else’s DNA test complied with policies and procedures. ROA. 345. Mr. Mai testified:

[W]e do have the ability to review each other’s work....in our lab...we review each other’s work. While I’m not present to – exactly like an eagle eye over somebody, I can look over their notes, I can make sure if they documented something, it should be documented, or something that should be documented is noted....that is also part of that review process. **I want to make sure, as a reviewer, as somebody that’s not there at the exact moment when something is done**, that any notes, any documentation that’s taken...is necessary in our case folder that it can be reviewed at a later date and confirmed that it is done properly according to our procedures and protocols.

ROA. 345 (emphasis added).

Mr. Shawhan’s testimony as a technical reviewer, who did not perform or observe the testing, is identical to the issue presented in *Smith*, as Arizona argued that “a surrogate analyst can testify to all the same substance—that is, someone else’s substance—as long as he bases an ‘independent opinion’ on that material.” *Smith*, at 798-993. The *Smith* Court rejected this argument, finding that this would permit “every testimonial lab report” to potentially “come into evidence through any trained surrogate, however remote from the case”, without allowing defendants the “right to cross-examine the testing analyst about what she did and how she did it and whether her results should be trusted.” *Id.* at 799. This would result in an “end run” around

this Court's Confrontation Clause jurisprudence. *Id.* Applying *Smith*, the DNA reports and Mr. Shawhan's testimony were clearly inadmissible and violated Mr. McElveen's right to confrontation.

- iii. Under *Smith*, the presumptive CODIS match and correlating testimony is inadmissible.

The initial DNA report stated an investigative lead was developed after the exterior backpack DNA swab was entered into CODIS. Detective Foster testified that this investigative lead implicated BJ McElveen. Pursuant to *Smith*, the presumptive CODIS match and correlating testimony is equally inadmissible, as it was only relevant and probative for its truth if it assumed the truth of the absent DNA analyst's conclusions. However, there is nothing in either report that indicates Mr. McElveen was actually a presumptive match to the initial DNA lead.

Mr. Shawhan testified that he reviewed the Crime Lab's "entire file" in preparation for his testimony but did not testify that there was a presumptive match to Mr. McElveen. Detective Foster claimed that he learned four days after the robbery, on "Friday evening," that the Crime Lab was "able to get an identification that led to Mr. McElveen. ROA. 311. However, the initial DNA report does not corroborate that Mr. McElveen was generated as an initial identification, and the

report also notes that the initial DNA examination was completed the following Tuesday, July 31, 2018. App., *infra*, 111a. Not only is Detective Foster's testimony uncorroborated, but it is also suspicious that a presumptive positive would have matched to BJ McElveen from a CODIS search given that he was a first-felony offender whose DNA profile would not have been uploaded in CODIS.

- iv. The First Circuit failed to apply the *Chapman* analysis in evaluating whether the admissibility of the DNA evidence through a surrogate analyst amounted to harmless error.

The Louisiana First Circuit Court of Appeal's opinion noted that even if the supplemental DNA report and Mr. Shawhan's testimony were inadmissible under *Smith*, any resulting error was harmless. App., *infra*, 22a. However, in conducting a harmless error analysis, the First Circuit failed to apply the *Chapman* standard.

In *Chapman v. California*, 386 U.S. 18 (1967), this Court established the standard for harmless error review for federal constitutional error in both state and federal courts. Under that test, the State bears the burden of proving "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. This Court has clarified that the critical inquiry is whether the verdict rendered was surely unattributable to the error. *Sullivan v. Louisiana*, 508 U.S. 275 (1993); *see also United States v. Alvarado-Valdez*, 521 F.3d

337, 341 (5th Cir. 2008) (“A defendant convicted on the basis of constitutionally inadmissible Confrontation Clause evidence is entitled to a new trial unless it was harmless in that there ‘there was [no] reasonable possibility that the evidence complained of might have contributed to the conviction.’”).

In citing *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the First Circuit improperly applied the harmless error analysis utilized for a Confrontation Clause violation stemming from the denial of a defendant’s right to impeach a witness. *See also United States v. Alvarado-Valdez*, 521 F.3d 337, 341 (5th Cir. 2008) (discussing different applications of *Chapman* depending on the type of Confrontation Clause error). In contrast, the present case involves the admission of evidence tainted by a Confrontation Clause violation, rather than a curtailment of cross-examination. Thus, the First Circuit should not have looked at the strength of the other evidence, nor shifted the burden to Mr. McElveen to prove he is entitled to relief but rather determined whether the State proved beyond a reasonable doubt that Mr. McElveen’s verdict is surely unattributable to the admission of the DNA reports and corresponding testimony.

- v. Under the correct legal standard, the State cannot prove that the error in admitting the surrogate DNA analyst's testimony did not contribute to Mr. McElveen's verdict beyond a reasonable doubt.

Under the correct *Chapman* standard, the State has the burden to prove beyond a reasonable doubt that Mr. Shawhan's testimony did not contribute to Mr. McElveen's conviction. The State cannot meet this burden because quite literally the only incriminating evidence against Mr. McElveen was that his DNA was found in a mixture of DNA from the exterior of a backpack used in a robbery.

While the plurality opinion referenced an anonymous tip that Baylon Trim and "BJ" committed the robbery, as well as the fact Mr. McElveen was arrested in Texas, the true foundation of the State's entire case is the DNA evidence. This is apparent from the outset, as the State told the jury during opening statements that the armed robbery was "almost the perfect crime," but that Mr. McElveen "gets sloppy and he leaves something behind." ROA. 157. The State then told the jury that it would see "who, what, when, and where there was DNA left. You'll hear testimony from DNA experts, police officers, witnesses, and two victims[.]" ROA. 158.

The State had the burden of proving Mr. McElveen's identity. The victims did not identify Mr. McElveen and there were no other witnesses to the crime. Thus, the only evidence of identity came from the conclusions drawn by the non-testifying F.

Nicole Proctor and Tabitha Mizell. While Detective Foster testified as a non-DNA expert that there was a presumptive match to Mr. McElveen, the true weight of the State's case came from Mr. Shawhan, the final witness called prior to deliberations. Not only did Mr. Shawhan's testimony consume 25 pages of the record on appeal, but the State referenced Mr. Shawhan's testimony five times throughout its closing arguments:

You heard all that testimony from the DNA expert. And one of the things he repeatedly said was that BJ McElveen cannot be excluded as a major contributor to the DNA profile. He said that the likelihood ratio was 2.9 billion. That is very far away from the number one. I may not have been good at counting the other day, but I know that one and 2.9 billion are very far away from each other. And he stated that they used the straps, the zippers, and the zipper pulls. ROA. 403.

You guys have plenty of common sense. You saw the robbery. You saw the camo backpack several times. You saw the DNA that was all over the backpack, the backpack that was found 30 to 45 minutes after the robbery, found near the bank. The backpack was also submitted to the Crime Lab the very next day. ROA. 405.

And BJ is seen on that video with his ungloved hand touching that backpack, touching the strap that went to the DNA lab the very next day, and he's the major contributor on there. ROA. 406.

That backpack that was found 30 or 45 minutes after the crime, the backpack that is being worn by one of the assailants in this picture, that backpack which the DNA said that -- you saw the report -- Mr. McElveen cannot be excluded as a major contributor to the DNA profile swab from the straps, the zipper, and the zipper pulls. What is he holding? The strap of that backpack...without a glove on his hand, and that is why his DNA is all over that backpack. ROA. 418.

The Crime Lab report states that he cannot be excluded, because he was the person who was touching that backpack on July 23, 2018, committing this crime. Also, the DNA report talks about the ratio. Again, 2.9 billion is very far from one. There's your identity - there's your identity, as one of the obligations that the State has to prove. ROA. 419.

As acknowledged by the State during closing arguments, the DNA evidence is the only evidence that proves Mr. McElveen touched a backpack that was used in a robbery. Mr. Shawhan's expert testimony—based on another expert's testimonial evidence—established that Mr. McElveen could not be excluded as one of at least three contributors to the DNA mixture from the backpack swab. This goes to the core of proving Mr. McElveen's identity, an essential element of which the State bears the burden of proof. While Mr. Shawhan could testify as a technical reviewer about the general policies and procedures of the Crime Lab, the only person who could testify whether those policies and procedures were followed in this case were the analysts who conducted the testing. Absent the testimony of Ms. Mizell and Ms. Proctor, there is no way of knowing whether the tests were conducted according to protocol and produced reliable results.

The fact that the prosecutor repeatedly highlighted the evidence that violated Mr. McElveen's right to confrontation in closing argument is enough to warrant reversal under *Chapman* because the State cannot credibly argue that there was no

possibility that the evidence it highlighted contributed to the verdict. *See United States v. Jackson*, 636 F.3d 687, 697 (5th Cir. 2011) (“Here, because the government’s closing argument relied on the very evidence that offends the Confrontation Clause, we cannot see how the government can conclusively show that the tainted evidence did not contribute to the conviction.”) (cleaned up); *see also United States v. Alvarado-Valdez*, 521 F.3d 337, 342-43 (5th Cir. 2008) (same).

CONCLUSION

BJ McElveen’s convictions rely on a DNA report authored by two absent analysts and Mr. Shawhan’s surrogate testimony about the report and its conclusions. This Court’s intervening decision of *Smith v. Arizona* makes clear that this evidence should have been excluded from Mr. McElveen’s trial. The Louisiana Supreme Court’s refusal to apply the clear rule enumerated in *Smith* has resulted in manifest injustice, as Mr. McElveen will now spend 30 years in prison for convictions based exclusively upon inadmissible evidence.

For these reasons, Mr. McElveen respectfully prays that this Court grant his petition, vacate the judgments of the Louisiana appellate courts, and remand this matter for reconsideration.

Respectfully submitted:

/s/ JANE HOGAN

JANE C. HOGAN, ESQ.
HOGAN ATTORNEYS
310 N CHERRY ST
HAMMOND, LA 70401
PHONE: (985) 542-7730
EMAIL: JANE@HOGANATTORNEYS.COM

February 16, 2026