No. 25-6922

In the Supreme Court of the United States

BJ MCELVEEN,
Petitioner,

v.

LOUISIANA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF IN OPPOSITION

ELIZABETH B. MURRILL
Attorney General
J. BENJAMIN AGUIÑAGA
Solicitor General
Counsel of Record

LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third St.
Baton Rouge, LA 70802
(225) 506-3746
AguinagaB@ag.louisiana.gov

QUESTIONS PRESENTED

At petitioner's criminal trial, the state trial court admitted into evidence a supplemental DNA report. That report was prepared by a lab analyst who did not testify at trial. Instead, a technical reviewer testified to the contents of the report. The question presented is:

> Whether the admission of, and testimony concerning, a report through a technical reviewer or supervisor violates the Confrontation Clause of the Sixth Amendment.

If the Court wishes to consider that question, the State respectfully asks that the Court add the following question as well:

> Whether *Crawford v. Washington*, 541 U.S. 36 (2004), should be reconsidered.

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INTRODUCTION

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. This Court has interpreted the Clause to "bar[] the admission at trial of 'testimonial statements' of an absent witness unless she is 'unavailable to testify, and the defendant ha[s] had a prior opportunity' to cross-examine her." *Smith v. Arizona*, 602 U.S. 779, 783 (2024) (quoting *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004)). In *Smith*, the Court applied that understanding to cover "an expert witness [who] restates an absent lab analyst's factual assertions to support his own opinion testimony." *Id.*

In this case, a lab analyst prepared a supplemental DNA report that the state trial court admitted into evidence at petitioner's trial. Although the lab analyst did not testify at trial, a technical reviewer who reviewed, and confirmed the results of, the report did. Put otherwise, the technical reviewer "participate[d]" in the lab's standard process for ensuring the integrity and accuracy of reports bearing the lab's name. *Id.* at 803; *see Bullcoming v. New Mexico*, 564 U.S. 647, 672 (2011) (Sotomayor, J., concurring in part) ("[T]his is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue."). Principally because the technical reviewer "participated in the [] technical reviewer process for the DNA analyses in this case" and thereafter was subject to cross-examination, Pet.App.20a–21a, the Louisiana First Circuit Court of Appeal found no Confrontation Cause violation—and the Louisiana Supreme Court denied review. That decision is correct.

Petitioner now asks the Court to "grant [his] petition, vacate the judgments below, and remand this matter for reconsideration" in light of *Smith*, which was issued while petitioner's appeal was pending in the First Circuit. Pet.i. Petitioner misunderstands the GVR mechanism. *See, e.g.*, *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (generally confining GVR orders to "intervening" or "recent" developments that the Court has "reason to believe the court below did not fully consider"). The First Circuit majority exhaustively relied on—and distinguished—*Smith*. Pet.App.16a, 18a, 19a, 21a, 22a. The First Circuit dissent likewise disagreed "[i]n light of" *Smith*. Pet.App.30a. Because there is no question that the lower court "fully consider[ed]" *Smith*, therefore, there is no basis to issue a GVR order in light of *Smith*. *Lawrence*, 516 U.S. at 167.

Construing the petition as a request for plenary review, that request fares no better. Although petitioner fails to survey the caselaw nationwide, there is a post-*Smith* split of authority on whether a technical reviewer or supervisor may, consistent with the Confrontation Clause, testify to the contents of a report prepared by a non-testifying subordinate. *Compare Commonwealth v. Walker*, 350 A.3d 54 (Pa. 2026); *Commonwealth v. Gordon*, 266 N.E.3d 369 (Mass. 2025); *State v. Thomas*, 334 A.3d 686 (Me. 2025); *State v. Hall-Haught*, 569 P.3d 315 (Wash. 2025); *State v. Green*, 2025 WL 2027873 (Tenn. Crim. App. July 21, 2025) (finding a Confrontation Clause violation), *with* Pet.App.23a, *writ denied* Pet.App.1a; *Busby v. State*, 422 So. 3d 974 (Miss. 2025); *Dunlap v. State*, 2025 WL 1039557 (Md. App. Ct. Apr. 8, 2025), *cert. denied* 491 Md. 645; *State v. Shea*, 2024 WL 4115377 (Minn. Ct. App. Sept. 9, 2024)

(finding no Confrontation Clause violation). That issue is pending before the Court in a separate petition for writ of certiorari. *See Busby v. Mississippi*, No. 25-6885.

The Court, however, would benefit from further percolation of the issue. *Smith* is not even two years old—and most of the decisions above are hardly a year old. *Cf. Franklin v. New York*, 145 S. Ct. 831, 837 (2025) (Gorsuch, J., respecting the denial of certiorari) ("The Court issued its latest word on the Confrontation Clause in *Smith* less than a year ago. Before weighing in again, we may benefit from the insights and further experience of our lower court colleagues."). In addition, as the presence of two certiorari petitions simultaneously presenting the same issue suggests, there is no doubt that there will be future opportunities for the Court to weigh in.

This case, moreover, is a poor vehicle to consider the issue. That is primarily because, as the First Circuit held in the alternative (Pet.App.22a), any error regarding the supplemental DNA report was harmless. Among other things, the jury heard testimony from Lieutenant Chuck Foster—with no objection from petitioner—that (a) an original DNA report produced an investigative lead identifying petitioner as a suspect and (b) the supplemental DNA report confirmed that presumptive match. Petitioner, moreover, told the First Circuit that the admission of the original DNA report did not violate the Confrontation Clause.

But, if the Court wishes to grant review in this case, it should add the question that Members of this Court have urged in recent years: whether *Crawford* should be reconsidered. The Court's Confrontation Clause jurisprudence "is unstable and badly in need of repair." *See Franklin*, 145 S. Ct. at 833 (Alito, J., respecting the denial of

certiorari). If the Court thus wishes to wade into the thicket again, there is no time like the present to reassess *Crawford*. Indeed, that would be especially appropriate in this case, which, more starkly than most, requires a court to consider who properly may be considered a "witness against" petitioner. Nonetheless, the State hastens to add that the proper course here is to deny the petition.

STATEMENT OF THE CASE

A. Legal Background

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. This Court has understood the Confrontation Clause to "protect[] a defendant's right of cross-examination by limiting the prosecution's ability to introduce statements made by people not in the courtroom." *Smith*, 602 U.S. at 784. The Court formerly "held that the Clause's 'preference for face-to-face' confrontation could give way if a court found that an out-of-court statement bore 'adequate indicia of reliability.'" *Id.* (quoting *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980)). But more recently, the Court in *Crawford* changed course, interpreting the Clause to "bar[] the admission at trial of 'testimonial statements' of an absent witness unless she is 'unavailable to testify, and the defendant ha[s] had a prior opportunity' to cross-examine her." *Id.* at 783. This Court has four times endeavored to apply that standard in the context of forensic reports—and those four cases form the relevant framework here.

1. In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), "state prosecutors introduced 'certificates of analysis' (essentially, affidavits) stating that lab tests had identified a substance seized from the defendant as cocaine." *Smith*, 602 U.S. at 785

(citing *Melendez-Diaz*, 557 U.S. at 308). But the prosecutors "did not call as witnesses the analysts who had conducted the tests and signed the certificates"—and thus, the defendant had no opportunity for cross-examination. *Id.* That was a Confrontation Clause violation, in the Court's view, because "[t]he certificates were testimonial: They had an 'evidentiary purpose,' identical to the one served had the analysts given 'live, in-court testimony.'" *Id.*

2. In *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), the Court extended *Melendez-Diaz* to a context where a substitute analyst from the same lab testified about the contents of a non-testifying analyst's report. There, the non-testifying analyst "tested the blood-alcohol level of someone charged with drunk driving, and prepared a 'testimonial certification' reporting that the level was higher than legal." *Smith*, 602 U.S. at 786. The substitute analyst who later testified about that testimonial certification had a "total lack of connection" to the certification. *Bullcoming*, 564 U.S. at 673 (Sotomayor, J., concurring in part).

That, too, was a Confrontation Clause violation. That was primarily because there was no question that the "certification" was testimonial, triggering the Clause's protections. But it was also because the "surrogate testimony" did not satisfy the cross-examination right assured by the Clause: That testimony "'could not convey what [the certifying analyst] knew or observed' about 'the particular test and testing process he employed.'" *Smith*, 602 U.S. at 786. "Nor could that 'testimony expose any lapses or lies on the certifying analyst's part[.]'" *Id.* So, "when the State elected to

introduce the certification, its author—and not any substitute—became the witness that the defendant had the right to confront." *Id.* (citation modified).

3. In *Williams v. Illinois*, 567 U.S. 50 (2012), a divided Court upheld an analyst's testimony regarding a defendant's DNA match. In *Williams*, the state police "sent vaginal swabs from a rape victim known as L.J. to a private lab for DNA testing." *Smith*, 602 U.S. at 786. The private lab sent back a DNA profile, which a state police analyst—Sandra Lambatos—checked against the police department's DNA database and which matched the defendant's DNA profile. *Id.* Lambatos testified at the defendant's trial regarding that DNA match, even though she "had no first-hand knowledge of how the private lab produced its results" or "whether those results actually came from L.J.'s vaginal swabs (as opposed to some other sample)." *Id.* at 787. As this Court later put it, "in addition to describing how she discovered a match, Lambatos became the conduit for what a different analyst had reported—that a particular DNA profile came from L.J.'s vaginal swabs." *Id.* The *Williams* Court found no Confrontation Clause violation across split opinions—and two general takeaways are key here.

First, five Justices agreed that the private lab's DNA profile report "was not testimonial"—and thus the Clause was not triggered—"because [the report] lacked sufficient formality." *Id.* at 788. Justice Thomas reached that conclusion based on his longstanding view that "the Confrontation Clause reaches [only] 'formalized testimonial materials, such as depositions, affidavits, and prior testimony, or statements resulting from 'formalized dialogue,' such as custodial interrogation."

Williams, 567 U.S. at 111 (Thomas, J., concurring) (quotation marks omitted). The private lab report flunked that test because it was "neither a sworn nor a certified declaration of fact," and "it was not the product of any sort of formalized dialogue resembling custodial interrogation." *Id.* A four-Justice plurality led by Justice Alito likewise reached this conclusion because the private lab report was "very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach." *Id.* at 58 (plurality op.). The report, Justice Alito continued, "was produced before any suspect was identified," it was not "sought [] for the purpose of obtaining evidence to be used against [the defendant]," and the DNA profile "was not inherently inculpatory." *Id.* The upshot of this five-Justice conclusion was that there was no Confrontation Clause violation because the Lambatos testimony regarding the private lab's DNA profile was not testimonial to begin with.

Second, the same four-Justice plurality led by Justice Alito determined that, even if the profile were testimonial, the Lambatos testimony premised upon that profile posed no constitutional problem because the Clause "has no application to out-of-court statements that are not offered to prove the truth of the matter asserted." *Id.* at 57–58. In the plurality's view, "[o]ut-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." *Id.* at 58. As this Court later recounted, however, the

remaining five Justices "rejected [this] 'not for the truth' reasoning." *Smith*, 602 U.S. at 788.

4. Finally, in *Smith*, a majority of the Court definitively resolved the "not for the truth" issue presented in *Williams*. Unlike *Williams*, *Smith* involved drugs and, in particular, the question whether the drugs in the defendant's possession were methamphetamine, marijuana, and cannabis. 602 U.S. at 789. A state police crime lab analyst, Elizabeth Rast, ran tests and prepared a report confirming that the substances in the defendant's possession were, in fact, those specific drugs. *Id.* at 790. But she did not testify at trial. Rather, an independent forensic scientist who "had no prior connection to the [] case"—Greggory Longoni—testified in Rast's stead based upon his "review[] [of] Rast's report and notes." *Id.* at 790–91.

The *Smith* Court held that this maneuver violated the Confrontation Clause. The Court reasoned that Rast's out-of-court report—conveyed through Longoni—was "offered for the truth of what it asserts." *Id.* at 795; *accord id.* at 798 ("Longoni could opine that the tested substances were marijuana, methamphetamine, and cannabis only because he accepted the truth of what Rast had reported about her work in the lab—that she had performed certain tests according to certain protocols and gotten certain results."). And because "the maker of those statements was not in the courtroom" for cross-examination, Longoni's testimony violated the Confrontation Clause. *Id.* at 798. The rule, the Court reiterated, is that—absent the underlying analyst's unavailability and an opportunity for cross-examination—the prosecution

may not "introduce [such] statements through a surrogate analyst who did not participate in their creation." *Id.* at 803.

Unlike in *Williams*, the *Smith* Court declined to resolve the threshold question whether Rast's report and notes were testimonial—and thus, whether the Confrontation Clause was implicated at all. *See id.* at 800–02. *Smith* thus did not disturb the five-Justice view in *Williams* regarding the non-testimonial nature of the private lab report.

B. Factual Background

One morning in 2018, two tellers at a Capital One Bank in Baton Rouge—Cornetta Washington and Erika Ellie-Jackson—began their usual process to open the bank. Pet.App.5a. Ms. Ellie-Jackson first disarmed the building from within, and then she gave Ms. Washington a signal that the building was clear to enter. *Id.* When Ms. Washington entered the bank, two armed and masked men stormed into the building with her. *Id.* Brandishing guns, they ordered the women to open the vault. *Id.* So the women did, and the robbers stole over $100,000. *Id.*

The crime was almost perfect, save for two missteps. *First*, the masks did not hide the robbers' voices. Both Ms. Washington and Ms. Ellie-Jackson told the police—and would later tell petitioner's jury—that the robbers clearly had New Orleans accents. Pet.App.8a. And *second*, the robbers apparently panicked when they fled, leaving the backpack they used ("containing wads of cash wrapped in Capital One wrappers and a loaded handgun") in a nearby field. Pet.App.5a. That backpack—

combined with a CrimeStoppers tip and confirmation that petitioner was indeed from New Orleans—would break open the case.

1. The police sent the backpack to the Louisiana State Police Crime Lab for DNA testing. That testing resulted in what this brief calls the Original DNA Report—a two-page report located at Pet.App.111a–12a. The Original DNA Report's signature page reflects that the analysis was performed by F. Nicole Proctor (who signed) and evidence screening was performed by Tabitha Mizell (who signed). Pet.App.112a. The Original DNA Report is not sworn, neither does it certify any finding of fact.

The Original DNA Report states that the Crime Lab took a swab from the backpack. Pet.App.111a. The Crime Lab subsequently generated a DNA profile (Exhibit 1A) from that swab, which confirmed "a major mixture of two contributors" of DNA. *Id.* The Original DNA Report further states that the Exhibit 1A profile "was searched in the Combined DNA Index System (CODIS) ... and generated an investigative lead." Pet.App.112a.

As petitioner's jury later learned from Lieutenant Chuck Foster of the East Baton Rouge Sheriff's Office (with no objection from petitioner), that investigative lead was petitioner. The Crime Lab "actually swabbed the zipper and the actual straps of the backpack, and they did – they were able to get an identification that led to Mr. McElveen," Lieutenant Foster testified. BIO.App.152.

2. That DNA hit, Lieutenant Foster would tell the jury, permitted him to obtain "a warrant for [petitioner's] DNA, just to compare it to the DNA results that were found[.]" BIO.App.153. After petitioner turned himself in, Lieutenant Foster obtained

two buccal swabs from petitioner, "put [them] in a box," and "sent [them] to the Crime Lab for comparison" against the Exhibit 1A DNA profile already generated from the backpack and reflected in the Original DNA Report. *Id.*

Enter the Supplemental DNA Report—a three-page report located at Pet.App.113a–15a.[1] It confirms Lieutenant Foster's testimony that petitioner's two buccal swabs were delivered to the Crime Lab. Pet.App.113a. Consistent with petitioner's identification following the Original DNA Report, the Supplemental DNA Report also lists petitioner as a "[s]uspect," alongside another man, Baylen Trim (who was not charged due to insufficient evidence, BIO.App.159–60). Pet.App.113a. Like the Original DNA Report, the Supplemental DNA Report is signed by Proctor and Mizell, it is unsworn, and it does not certify any finding of fact. Pet.App.115a.

The Supplemental DNA Report adds the following relevant statements regarding petitioner's buccal swabs:

- "DNA analysis was performed on ... one oral reference swab from B J McElveen (Exhibit 5) ['using LSPCL protocols']." Pet.App.114a.
- "The DNA from Exhibit[] 5 ... was amplified using the PCR-based PowerPlex Fusion System. The samples were analyzed using a capillary electrophoresis instrument, and DNA typing was conducted according to LSPCL protocols." *Id.*
- "Exhibit 5 A DNA profile was obtained from the reference sample from B J McElveen." *Id.*
- "Exhibit 1A B J McElveen (Exhibit 5) cannot be excluded as a major contributor to the DNA profile obtained from the swab taken from

[1] As discussed at trial, Pet.App.88a, there is a brief "nonanalytical discrepancy" report appended to the Supplemental DNA Report, but that issue is immaterial and irrelevant here.

> the straps, zipper, and zipper pulls of the backpack; see Statistical Analysis." *Id.*

The "Statistical Analysis" is a brief table on the final page of the Supplemental DNA Report, stating that, "[a]ssuming two contributors [in the Exhibit 1A DNA profile generated from the backpack], the deduced DNA profile was VALUE times more likely to be observed if it had originated from a mixture of DNA from B J McElveen and an unknown contributor than if it had originated from two unrelated, random individuals." Pet.App.115a. The "VALUE" supplied by the table ranges from 2.69 billion to 13.7 billion, *id.*, indicating the high degree of confidence that petitioner's DNA could not be excluded as a major contributor to the Exhibit 1A DNA profile generated from the backpack and reflected in the Original DNA Report.

Coincidentally, while the police were running down this DNA lead, Lieutenant Foster received a CrimeStoppers tip from a person who "knew very specific details of this robbery that [were] not shared to the public" and who identified "BJ." BIO.App.159. That was a powerful lead because it was independently sourced: At that time, "[n]o one knew, except for [Lieutenant Foster] and the FBI and other agents with our office," that Lieutenant Foster had already secured a warrant for petitioner's DNA based on the DNA match facilitated by the Original DNA Report. *Id.* So it was no surprise to the police—and eventually the jury—that the Original DNA Report and the Supplemental DNA Report confirmed that petitioner robbed the Capital One Bank. (And that is on top of, as the jury heard, confirmation that petitioner was indeed from New Orleans, BIO.App.160–62, aligning with the victims' testimony.)

As with the Original DNA Report, Lieutenant Foster testified to the contents of the Supplemental DNA Report with the jury (with no objection from petitioner). He explained that, after he secured the buccal swabs from petitioner, "everything was ran again and it did confirm that he was, in fact, the recipient or the person whose DNA was, in fact, on the backpack[.]" BIO.App.162. He also testified (again, with no objection from petitioner) that "[a]ll the evidence that we collected pointed to Mr. McElveen" and "the DNA break in this case[] was the break towards the identification." BIO.App.175.

C. Procedural Background

1. Petitioner was ultimately charged with armed robbery, and a jury found him guilty. Pet.App.4a. At his trial, there was a significant controversy over the admission of the Original DNA Report and the Supplemental DNA Report, which were packaged together as Exhibit S26. The lab analyst who performed the analyses, Proctor, had moved to Texas in the interim and did not testify at trial. Pet.App.43a. The evidence screener, Mizell, likewise did not testify. Instead, the State sought to admit both Reports through the testimony of Zachary Shawhan, a technical reviewer at the Crime Lab for both Reports. Although petitioner's counsel stated "I have no objection," the state trial court paused proceedings, called counsel to chambers, and subsequently engaged in a lengthy colloquy back on the record that ended in the state trial court refusing to allow Shawhan to testify to the contents of S26. *See* Pet.App.37a–74a.

The State took a mid-trial, emergency writ to the First Circuit Court of Appeal, which reversed the state trial court's decision. Specifically, the First Circuit stated that "[n]o error under the Confrontation Clause occurs when a DNA expert testifies that in his or her opinion the DNA profile developed from a sample taken from defendant matches the DNA profile developed by other, non-testifying technicians from biological samples taken from the evidence." Pet.App.75a. The First Circuit "[f]urther" stated that "the Louisiana State Police Crime Laboratory scientific analysis reports are admissible." *Id.* And "[e]ven if forensic DNA reports are admitted in evidence without in-court testimony of the scientist/analyst who either signed the certification or performed or observed the test reported in the certification, generally, there is no Sixth Amendment Confrontation Clause violation because the reports are not testimonial." *Id.*

Following the First Circuit's ruling, trial resumed—and these are the key aspects of Shawhan's testimony both before and after the First Circuit's ruling. He testified that "the DNA analysis process" involves a number of steps, including "extraction, quanti[fic]ation, amplification," and the use of "an instrument called a genetic analyzer that, then, allows us to view that DNA profile." Pet.App.34a. The analyzer is a machine the produces an "electropherogram," which is not unlike an electrocardiogram in that it produces "peaks [that] are visualizations of what the DNA profile is." *Id.* That "visualized e-gram" is what allows forensic scientists to "mak[e] interpretations" about the resulting DNA profile. Pet.App.35a.

Relevant here, Shawhan explained that the Crime Lab has "an extensive review process" surrounding DNA analysis: "We have a quality review, a technical review, and then an administrative review." Pet.App.36a. "[I]n this case," he "was a technical reviewer" for the Original DNA Report and Supplemental DNA Report. *Id.* As he described it,

> The role of a technical reviewer is to verify and confirm that all of [the] policies and procedures were adhered to. This would include every step of the process. This would include screening, this would include extraction, this would include quant, amp, putting on the analyzer, and interpretation, and the results that go into a report. That's what the tech review process is.

Pet.App.68a. So, as "part of the file and the review process," Shawhan was "looking at all data generated from this case. This would be data from every step of the process, from screening, extraction, quantification, amplification, genetic analyzer, and interpretation." Pet.App.69a. Following that review, Shawhan concurred with the results in both Reports. Pet.App.36a.

Shawhan also testified to the contents of both Reports. As to the Original DNA Report, Shawhan confirmed its statement that there was "a major mixture of two contributors" identified in the Exhibit 1A DNA profile obtained from the backpack. Pet.App.89a. As to the Supplemental DNA Report, Shawhan confirmed that "we were able to make comparisons [against the Exhibit 1A DNA profile] based on reference samples that were submitted." Pet.App.90a. Specifically, Shawhan restated the Report's own statement that "Exhibit 5 is a reference sample from BJ McElveen." Pet.App.90a–91a. Shawhan also restated the Report's conclusion that "BJ McElveen

cannot be excluded as a major contributor to the DNA profile obtained from the swab taken from the straps, zipper, and zipper pulls of the backpack." Pet.App.91a.

On cross-examination, there was no question that Shawhan could not answer about the testing and results in both Reports. Perhaps recognizing as much, petitioner's counsel asked Shawhan if he could account for conduct *outside* the Crime Lab, namely whether police officers followed the Crime Lab's protocols in collecting the backpack and other items from the crime scene. Pet.App.106a. Shawhan replied, "As an analyst for Louisiana State Police Crime Lab, I can really only testify to our results and our policies and procedures.... 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." *Id.*

2. Following petitioner's guilty verdict, he appealed several issues to the First Circuit, including (as relevant here) a Confrontation Clause issue. Importantly, petitioner narrowed the scope of his challenge on appeal. In particular, petitioner expressly waived any challenge to the admission of (and testimony about) the Original DNA Report; he recognized, correctly, that "[t]his type of report, generated before Mr. McElveen became a suspect that only described DNA profiles is akin to the [private lab] report in *Williams* and thus introducing the initial two-page report did not violate Mr. McElveen's right to confrontation." BIO.App.90. The First Circuit accepted that concession. Pet.App.13a n.8 ("The defendant concedes the initial report did not violate his right of confrontation as it did not name him as a suspect or DNA match."). So narrowed, petitioner's challenge in the First Circuit rested solely on the

ground that "the trial court violated his right to confrontation in allowing Mr. Shawhan to testify about the supplemental DNA results, though he was not the DNA analyst who performed the testing." Pet.App.13a.[2]

The First Circuit rejected that argument, finding no basis to reconsider its mid-trial disposition. The First Circuit first reaffirmed that the Original DNA Report "and testimony by both Lieutenant Foster and Mr. Shawhan regarding the evidence recovered, submitted, and tested, and the results of [the] presumptive analysis were properly admitted under *Williams*[.]" Pet.App.21a. As for the Supplemental DNA Report, the First Circuit held that both the Report and Shawhan's testimony "were properly admitted under *Smith*, *Bullcoming*, and *Melendez-Diaz*" because Shawhan was "a participant in the process." *Id.*; *cf. Smith*, 602 U.S. at 803 (foreclosing the introduction of "statements through a surrogate analyst who did not participate in their creation"); *Bullcoming*, 564 U.S. at 672 (Sotomayor, J., concurring in part) ("[T]his is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue."). Specifically, he "reviewed every step of the process to verify that the established procedure for handling and analyzing the defendant's sample had been followed." Pet.App.21a. In so holding, the First Circuit did not revisit its mid-trial

[2] In a rehearing application in the First Circuit, in his Louisiana Supreme Court writ application, and now in his petition, petitioner has attempted to claw back his waiver claiming that "the presumptive CODIS match and correlating testimony is inadmissible." BIO.App.10, 16–17, 138–41; *see* Pet.14 ("Detective Foster's testimony about an initial presumptive lead generated by a non-testifying analyst" is "equally admissible under *Smith*"); Pet.16 ("Under *Smith*, the presumptive CODIS match and correlating testimony is inadmissible.").

determination that the Report was "not testimonial," Pet.App.75a, instead "[a]ssuming" otherwise for the sake of argument post-trial, Pet.App.21a.

In the alternative, the First Circuit held that any Confrontation Clause error was harmless. Pet.App.22a–23a. "[T]he supplemental test results merely verified and confirmed the presumptive CODIS match" that arose out of the Original DNA Report. Pet.App.23a. Moreover, "Shawhan's testimony on the results of the supplemental DNA report was cumulative of testimony presented by Lieutenant Foster," which is detailed above. *Id.* And of course, the CrimeStoppers tip and petitioner's New Orleans accent combined to incriminate petitioner. *Id.*

One First Circuit judge dissented "[i]n light of" *Smith* but offered no further reasoning. Pet.App.30a. The Louisiana Supreme Court denied review. Pet.App.1a.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS CORRECT.

The First Circuit reached the right result below based on the right reasoning. The Sixth Amendment's Confrontation Clause assures the right of an accused "to be confronted with the witnesses against him." In the context of lab reports, this Court has correctly recognized that a lab analyst who prepared a report may, in certain circumstances, be considered a witness against an accused if the contents of that report are subsequently admitted at trial. But the Court has left open—and indeed, has never considered—whether individuals involved in the technical review of such a report likewise may be considered a witness against the accused such that cross-examination of those individuals at trial avoids any Confrontation Clause issue.

Justice Sotomayor expressly made this point in *Bullcoming*. That case involved a lab report signed by a non-testifying analyst and admitted through another analyst "who had neither observed nor reviewed [the non-testifying analyst's] analysis." 564 U.S. at 655. The Court held that this maneuver violated the Confrontation Clause because the report itself was "testimonial" and the defendant had no opportunity to cross-examine the non-testifying analyst. *Id.* at 652. In agreeing with that outcome, Justice Sotomayor wrote separately to "highlight some of the factual circumstances that this case does *not* present." *Id.* at 672 (Sotomayor, J., concurring in part). Among those unaddressed circumstances, Justice Sotomayor explained, "this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." *Id.* "It would be a different case," she continued, "if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results." *Id.* at 673. But the *Bullcoming* Court did not "need [to] address what degree of involvement is sufficient because [t]here [the testifying analyst] had no involvement whatsoever in the relevant test and report." *Id.*

More recently, the *Smith* Court itself used language that accords with Justice Sotomayor's view. In *Smith*, the Court reprised the general rule that "[a] State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her." 602 U.S. at 802–03. To that, the *Smith* Court added that "[n]either may the State introduce those statements through a surrogate analyst who did not participate

in their creation." *Id.* at 803. As multiple lower courts have recognized, that inherently suggests that an individual who *did* participate in the report process may testify to avoid a Confrontation Clause issue. *See* Pet.App.19a–21a; *see Shea*, 2024 WL 4115377, at *5 ("Unlike Longoni [in *Smith*], B.K. was directly involved with this case as she participated as the technical reviewer in finalizing the BCA's conclusions by independently reviewing the machine-generated DNA profiles."); *Busby*, 422 So. 3d at 979 (reaffirming the Mississippi Supreme Court's endorsement of a "testifying analyst [who] was 'actively involved in the production of the report and had intimate knowledge of analyses even though [he or] she did not perform the tests first hand'").

The Sixth Amendment's plain text confirms the instinct behind Justice Sotomayor's writing and the *Smith* Court's statement. As reproduced above, the Confrontation Clause demands confrontation of the "witnesses against" an accused. In the context of forensic lab reports, such reports commonly are the product of a collective body of analysts and reviewers who ensure and maintain the integrity and accuracy of reports bearing the lab's name. *See Williams*, 567 U.S. at 85 (plurality op.) (finding it significant that, "in many labs, numerous technicians work on each DNA profile" and citing examples where upwards of a dozen analysts are involved). Logically, therefore, confrontation of one such analyst or reviewer at trial through cross-examination ordinarily fulfills the Confrontation Clause's demand, assuming that the underlying report is testimonial.

To put the point in evidentiary terms—as the Maryland courts have—"a technical reviewer's analysis 'is not hearsay, but rather the reviewer's independent opinion based on the reviewer's thorough, substantive review of the report and adoption of its results and conclusions[.]'" *Dunlap*, 2025 WL 1039557, at *11. Accordingly, the technical reviewer is "the functional equivalent of a second author of the [] report, and therefore his testimony is not hearsay." *Id.* (citation modified); *see Smith*, 602 U.S. at 786 ("When the State elected to introduce the certification, its author—and not any substitute—became the witness that the defendant had the right to confront." (citation modified)). And that means such testimony (and the underlying report) poses no Confrontation Clause issue, since "[t]he Clause's prohibition 'applies only to testimonial hearsay.'" *Smith*, 602 U.S. at 784.

All this is why the First Circuit correctly found no Confrontation Clause violation in the admission of the Supplemental DNA Report and Shawhan's corresponding testimony. Like virtually all DNA technical reviewers, Shawhan assessed all "data from every step of the process, from screening, extraction, quantification, amplification, genetic analyzer, and interpretation." Pet.App.69a. And Shawhan agreed with, and joined, the results in both Reports. Pet.App.36a. In that way, he ensured that both Reports properly may bear the lab's name—and indeed, may be defended in court—because of the accuracy and integrity that he substantively (and independently) confirmed. Because he was "the functional equivalent of a second author of the [] report," *Dunlap*, 2025 WL 1039557, at *11

(citation omitted)—who was thereafter subject to cross-examination—there is no question that the First Circuit reached the right result.[3]

II. THE QUESTION PRESENTED WARRANTS FURTHER PERCOLATION.

As noted above, the lower courts are beginning to split over whether and when—consistent with the Confrontation Clause—a technical reviewer or supervisor may testify to the contents of a report prepared by a non-testifying analyst. But that split is exceedingly young. After all, *Smith* itself is only two years old—and the ink is not yet dry on many of the more-recent decisions. *Cf. Franklin*, 145 S. Ct. at 837 (Gorsuch, J., respecting the denial of certiorari) ("The Court issued its latest word on the Confrontation Clause in *Smith* less than a year ago. Before weighing in again, we may benefit from the insights and further experience of our lower court colleagues.").

The relative youth of that split is important because, although broad phrases like "forensic reports" can suggest that all issues in this area are the same, forensic reports differ, analyses differ, and reviewer statuses differ. Sometimes technical reviewers actually co-sign the report, *e.g.*, *Busby*, 422 So. 3d at 975; sometimes they sign off behind the scenes, *e.g.*, Pet.App.36a, 106a, 108a. Sometimes the analysis is for drugs or blood alcohol content, while other times the analysis requires a DNA

[3] Although the First Circuit did not need to go further, it bears noting that this result is especially correct in the DNA context where a technical reviewer is essentially running the same comparison between machine-generated data (the electropherograms, Pet.App.34a) that the underlying analyst ran—and reaching the reviewer's independent conclusion. *See Shea*, 2024 WL 4115377, at *5 ("Here, unlike the expert's testimony in *Smith*, B.K.'s testimony was premised upon a machine-generated DNA profile. Raw data generated by a machine is not an out-of-court statement offered for the truth of the matter asserted such that Confrontation Clause or hearsay concerns would be triggered.").

profile generation and comparison—which are significantly different tests. *Compare Smith*, 602 U.S. at 791 (citing a microscopic examination, chemical color test, and gas chromatograph/mass spectrometer test for drugs); *Bullcoming*, 564 U.S. at 654 n.1 (describing "obtaining an accurate BAC measurement" as "not so simple or certain"), *with Shea*, 2024 WL 4115377, at *5 (boiling the DNA comparison process down to comparing machine-generated data); *Williams*, 567 U.S. at 58 (plurality op.) (the generation of a DNA profile is "not inherently inculpatory"). And sometimes the technical reviewer or supervisor in question is not as closely connected to the underlying report as others commonly are. *See Walker*, 350 A.3d at 88 (testimony of a "nurse manager and clinical director ... was not an acceptable substitute for the testimony of the sexual assault nurse examiners"). As these examples illustrate, the Court would benefit from lower courts continuing to run through these permutations to visualize the full spectrum of possible Confrontation Clause issues.

Finally, that this Court has two pending certiorari petitions raising the same issue demonstrates that there will be no shortage of future vehicles for the Court to consider. Accordingly, the Court need not strain to grant review at this time, especially in light of the vehicle issues identified below.

III. THIS IS A POOR VEHICLE TO CONSIDER THE QUESTION PRESENTED.

Further percolation is especially warranted since this is a less-than-ideal vehicle for considering the issue presented—as underscored by petitioner's attempts to press arguments that he failed to preserve below.

A. Any Error Was Harmless.

Petitioner's vehicle problem stems from the First Circuit's correct determination that any Confrontation Clause error in this case was harmless. At least three points warrant mentioning here.

1. Most important, petitioner did not object to Lieutenant Foster's testimony regarding the Original DNA Report and the Supplemental DNA Report—and in particular, his testimony that both Reports implicated petitioner.

First, petitioner did not object to Lieutenant Foster's testimony regarding the Original DNA Report. Lieutenant Foster testified that the DNA on the backpack obtained from the crime scene "led to Mr. McElveen." BIO.App.152. The State subsequently confirmed, "Is it fair to say, million-dollar question, is that the DNA results from the Crime Lab helped go towards identity of Mr. BJ McElveen?" BIO.App.160. "Only Mr. BJ McElveen," Lieutenant Foster testified. *Id.* Petitioner never objected. And then again, the State asked Lieutenant Foster if "the DNA hit" is what "br[oke] the case." BIO.App.162. "[P]retty much," he said. *Id.*

Second, petitioner did not object to Lieutenant Foster's testimony regarding the Supplemental DNA Report. He testified, "I know we had another – after the actual DNA reference swab was taken from Mr. McElveen, everything was ran again and it did confirm that he was, in fact, the recipient or the person whose DNA was, in fact, on the backpack[.]" *Id.* And he confirmed on redirect that "[a]ll the evidence that we collected pointed to Mr. McElveen" and "the DNA break in this case[] was the break towards the identification." BIO.App.175.

2. On top of that unobjected-to testimony, petitioner expressly waived below any Confrontation Clause challenge to the admission of the Original DNA Report. He told the First Circuit: "This type of report, generated before Mr. McElveen became a suspect that only described DNA profiles is akin to the Cellmark report in *Williams* and thus *introducing the initial two-page report did not violate Mr. McElveen's right to confrontation*." BIO.App.90 (emphasis added).

That is important because the Original DNA Report identified "a major mixture of two contributors" of DNA on the backpack obtained from the crime scene. Pet.App.111a. That Report further states that the resulting DNA profile "was searched in the Combined DNA Index System (CODIS) as a one-time event and generated an investigative lead." App.112a. And the jury knew from Lieutenant Foster's testimony that the "investigative lead" was, in fact, petitioner BJ McElveen. BIO.App.152, 160, 162.

3. Finally, in addition to that DNA testimony, the jury heard two key pieces of testimony linking petitioner to the armed robbery.

First, they heard Lieutenant Foster's testimony that he received a CrimeStoppers tip from a person who "knew very specific details of this robbery that [were] not shared to the public" and who identified "BJ." BIO.App.159. That was powerful testimony because, at that time, "[n]o one knew, except for [Lieutenant Foster] and the FBI and other agents with our office," that Lieutenant Foster had already secured a warrant for petitioner BJ McElveen's arrest based on the DNA match facilitated by the original DNA report. *Id.*

Second, the jury heard testimony that both victims who worked at the bank told police that the robbers spoke like they were "from New Orleans." BIO.App.160–62. And in fact, the jury heard that petitioner himself was from New Orleans—betrayed by an accent that stuck out in Baton Rouge. *Id.*

Taking all of these points together, there is no question that, as the First Circuit concluded, the jury's verdict was "surely unattributable to [any Confrontation Clause] error." Pet.App.22a (citing *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).[4]

B. Petitioner's Waived and Forfeited Arguments Are Meritless.

Apparently recognizing how much he gave up by not fighting the Original DNA Report and Lieutenant Foster's testimony, petitioner tried to make up lost ground on rehearing in the First Circuit, then in his writ application to the Louisiana Supreme Court, and now again in his petition in this Court. *Supra* n.2. To no avail.

First, as to the original DNA report, petitioner acknowledged that he had previously "conceded" that the admission of the Original DNA Report "would not violate [his] confrontation rights." BIO.App.16. Nonetheless, he claimed that "[t]his is no longer the case, as *Smith* now holds that '[w]hen an expert conveys an absent

[4] Petitioner strangely claims (Pet.17–18) that the First Circuit "failed to apply" the harmless-error standard described in *Chapman v. California*, 386 U.S. 18 (1967). In the same breath, however, petitioner acknowledges that "[t]his Court has clarified that the critical inquiry [post-*Chapman*] is whether the verdict rendered was surely unattributable to the error." Pet.17 (citing *Sullivan*, 508 U.S. 275). That is exactly what this Court said in *Sullivan*. *See* 508 U.S. at 279 ("The inquiry [is] ... whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error."). And that is exactly the standard the First Circuit applied. *See* Pet.App.23a ("[W]e find that the verdicts in this case were surely unattributable to any error in the admission of the supplemental test results and Mr. Shawhan's related testimony.").

analyst's statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth ... [a]nd if those are testimonial ... the Confrontation Clause will bar their admission.'" *Id.*

This argument goes nowhere. That is principally because it does not overcome petitioner's failure to object to the Original DNA Report's admission and then his express waiver of any challenge to it. In all events, petitioner overreads *Smith*. As *Smith* explained, a Confrontation Clause issue arises only where the statement at issue is testimonial—an issue *Smith* did not decide on the facts of that case. *See* 602 U.S. at 800–01. And here, as petitioner conceded under *Williams*, the Original DNA Report is not testimonial because it was "generated before Mr. McElveen became a suspect." BIO.App.90; *accord* Pet.App.21a (First Circuit's agreement that "the report and testimony by both Lieutenant Foster and Mr. Shawhan regarding the evidence recovered, submitted, and tested, and results of presumptive analysis [in the original DNA report] were properly admitted under *Williams*" because petitioner "was not a suspect or target when the presumptive test results were generated"). *Smith* did not disturb that reasoning, and thus, petitioner has no foothold to escape his failure to object and his express waiver.

Second, as to petitioner's failure to object to Lieutenant Foster's testimony about the Original DNA Report and subsequent match, petitioner's after-the-fact complaints fail for the same reason. He claims that *Smith* announced "a new rule of law" after his trial, and so "he should not be faulted for failing to object to Detective Foster's testimony under *Smith*." BIO.App.16. As just explained, however, *Smith* did

not decide any question about the testimonial nature of a DNA report. Because the Original DNA Report was not testimonial, Lieutenant Foster's unobjected-to testimony regarding that Report poses no Confrontation Clause issue. Moreover, even if *Smith* had announced some new "testimonial" rule, that would not excuse petitioner's failure to object and thereby preserve a challenge along the lines of such a rule.

IV. IF THE COURT GRANTS REVIEW, IT SHOULD RECONSIDER *CRAWFORD*.

Although Louisiana fully opposes review, if the Court grants review, the Court should also reconsider *Crawford*. That is so for at least two reasons.

First, it is no secret that *Crawford* has been a nightmare for the bench and the bar. *See Franklin*, 145 S. Ct. at 831 (Alito, J., respecting the denial of certiorari) ("Despite repeated attempts to explain what *Crawford* meant by 'testimonial statements,' our Confrontation Clause jurisprudence continues to confound courts, attorneys, and commentators." (collecting authorities)); *id.* at 836, 837 n.2 (Gorsuch, J., respecting the denial of certiorari) (agreeing with Justice Alito that "we may need to rethink our course sometime soon" and that "'the real problem may' lie not with any particular test but, more fundamentally, with the notion that the Confrontation Clause's protections hinge on whether a statement is 'testimonial'"). Twenty-two years of a "Confrontation Clause jurisprudence [that] is unstable and badly in need of repair," *id.* at 833 (Alito, J.), are more than sufficient to warrant refusing "to stay the course and continue on," *Mathis v. United States*, 579 U.S. 500, 544 (2016) (Alito, J., dissenting).

Second, this case is uniquely suited for reconsideration of the Court's Confrontation Clause jurisprudence. That is because *Crawford* is built upon a particular understanding of the phrase "witnesses against." *See Crawford*, 541 U.S. at 42–56. And this case, too, turns on that phrase in at least two respects.

As explained above, the Court (like the First Circuit) could find no Confrontation Clause violation because petitioner did, in fact, confront the witness against him—by cross-examining a technical reviewer embedded in the process ensuring the accuracy and integrity of the Supplemental DNA Report. The "witness against" petitioner was a collective body of individuals that generated, and confirmed the accuracy of, the Report. Having cross-examined one such individual, therefore, petitioner enjoyed his Confrontation Clause right if any such right is even implicated.

The Could also could find no Confrontation Clause violation because the Supplemental DNA Report contains no "statement by a 'witnes[s]'" at all since the Report is not a "formalized statement[] such as [an] affidavit[], deposition[], prior testimony, or confession[]." *Williams*, 567 U.S. at 82 (plurality op.); *id.* at 111 (Thomas, J., concurring in the judgment). That would be in line with the First Circuit's mid-trial holding that the Report is "not testimonial." Pet.App.75a. And it would be bolstered by the fact that the Supplemental DNA Report is not sworn and certifies no finding of fact.

Either way, the Court's analysis would turn on the phrase—"witnesses against"—on which *Crawford* unsuccessfully attempted to build a workable

jurisprudence. Accordingly, if the Court is inclined to grant review in this case, it should take this opportunity to reconsider the *Crawford* line of cases.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

ELIZABETH B. MURRILL
Attorney General
J. BENJAMIN AGUIÑAGA
Solicitor General
Counsel of Record
Louisiana Department of Justice
1885 N. Third Street
Baton Rouge LA 70802
(225) 506-3746
AguinagaB@ag.louisiana.gov